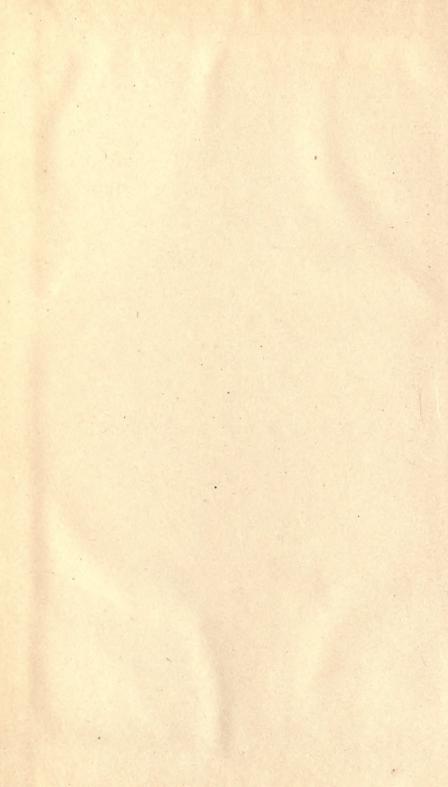
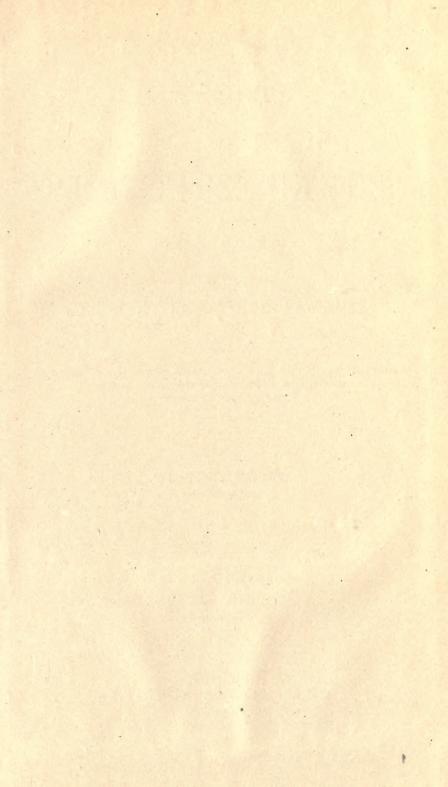
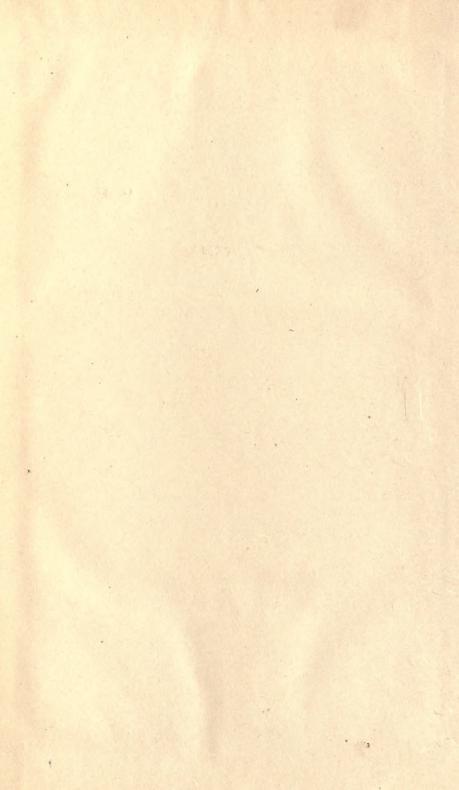


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REPORTS

OF

PRACTICE CASES,

DETERMINED

IN THE

COURTS OF THE STATE OF NEW-YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD NEW-YORK REPORTS ISSUED DURING THE PERIOD COVERED BY THIS VOLUME.

BY

AUSTIN ABBOTT,

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ERRATUM.

In the first edition the following words, at the bottom of page 213, were omitted:—"and if the testator subscribes before the witnesses."

ABBOTT'S PRACTICE REPORTS

NEW-YORK.

NEW SERIES.

LEA against WOLF.

Supreme Court, General Term, First Department; October, 1873.

Modifying 13 Abb. Pr. N. S., 389.

TRADEMARK.—INJUNCTION.

As a general rule geographical names cannot be appropriated as trademarks, and their use by another will not be enjoined; but the rule has its exceptions, where the intention in the adoption of the descriptive word is not so much to indicate the place of manufacture, as to intrench upon the previous use and popularity of another's trademark.

Where plaintiffs had for thirty years manufactured at Worcestershire, an article sold by them under the name of "Worcestershire Sauce,"—Held, that the defendants should be enjoined from selling under that name a similar article, put up with labels and wrappers, imitating in color, size, language and appearance, those used by the plaintiffs, but not manufactured at Worcestershire.

Appeal by plaintiffs from so much of an order of special term as denied an injunction pendente lite restraining defendants from employing the words "Worcestershire Sauce" as a trademark.

This action was brought by John W. Lea and N. S.—XV.—1

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others, against Julius Wolf and another, to enjoin them from selling a sauce made by them as "Worcestershire Sance," the plaintiffs claiming that those words were their trademark, which they had an exclusive right to use. They also sought to restrain the defendants from using labels and wrappers in imitation of those used by the plaintiffs. A motion was made for an injunction pendente lite, which was granted as to the use of the labels and wrappers, but was denied as to the use of the words "Worcestershire Sauce." (Reported in 13 Abb. Pr. N. S., 389.) From that order this appeal was taken. The other facts necessary to an understanding of the case are stated in the opinion.

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C. W. Sandford, for plaintiffs.

H. H. Shook, for defendants.

BY THE COURT.—FANCHER, J.—The imitation of the plaintiff's labels on the celebrated article of their preparation was so palpable that the learned judge at special term granted an injunction against the defendants, restraining such imitation. He, however, held that in regard to the name-"Worcestershire Sauce" -"it contains nothing but the name of the place where it is manufactured, and the word 'sauce' as descriptive of the article sold," and that "neither of these words can be used in such a manner as to give the exclusive use of them as a trademark." The learned judge referred to several decisions as authority upon the point. Among them is a case decided by himself (Wolfe v. Goulard, 18 How. Pr., 64). That case has been cited with approbation in thirteen States in the Union. Perhaps the cases are so numerous as to establish a uniform current of authority in favor of the principle enunciated at special term.

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But we are not called upon to extend the principle to a case where it is not strictly applicable. For the purposes of this case it is not necessary to deny that the name of the place where an article is manufactured, and the word which is descriptive of the article manufactured, may not be used by any tradesman who there makes and vends the article. This is not this case. The defendants' preparation is not manufactured, at "Worcestershire"; the plaintiffs' is, and has been for more than thirty years. The adoption, under such circumstances, of the very words contained in the plaintiffs' trademark, and the imitation in colors, size. language and appearance, of their labels and wrappers, are irresistible proof of an intention of the defendants to deceive the public and to lead purchasers to suppose that the defendants' preparation was the original Worcestershire sauce, so long manufactured by the plaintiffs. Where such an intention exists, the defendants should not be protected in their fraudulent imitation by the pretense that in the words employed the name of a place and the word descriptive of the article only are used. The defendants, doubtless, might, under proper circumstances, employ the name of a place where an article is mauufactured, as well as the word descriptive of its character; but such words must be employed honestly and properly, and not with a design to imitate and deceive to the detriment of another. Where words or names are in common use, no one person can claim a special appropriation of them to his peculiar use; but where words, and the allocation of words, have, by long use, become known as designating the article of a particular manufacturer, he acquires a right to them, as a trademark, which competing dealers cannot fraudulently invade. The essence of the wrong is the false representation and deceit. When the improper design is apparent, an injunction should be issued. In such cases injunctions have been

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sustained, though the name of a place, or of a celebrated person, were within the trademark protected by the injunction (Messerole v. Tyneberg, 4 Abb. Pr. N. S., 410; Matsell v. Flanagan, 2 Id., 459; Amoskeag v. Spear, 2 Sandf., 599; Caswell v. Davis, 4 Abb. Pr. N. S., 6; Newman v. Alvord,* 49 Barb., 588; Wotherspoon v. Currie, 27 L. Times, N. S., 393).

In the last mentioned case the plaintiff had purchased from Fulton & Co., of Glenfield, near Paisley, the good will and trademark of their business. They had for several years prior to 1847 manufactured powdered starch, principally from East India sago; and was called "Glenfield patent double refined powder starch," and commonly "Glenfield starch." The plaintiff had actually removed his manufactory from Glenfield to Maxwelton, where the starch was made and sold, when he applied for an injunction against John Currie, trading as Currie & Co. Currie had rented a small building from Fulton & Co., at Glenfield, where he manufactured starch, which was sold in packets similar in size and appearance to those of the plaintiff, and which he labeled "the royal palace double refined patent powder starch, manufactured by Currie & Co., Glenfield."

The plaintiff's case was that the defendant had taken the small building at Glenfield, and adopted the mark or label containing the name of that place, for the express purpose of inducing people to believe that his starch was the article made by the plaintiff. The vice chancellor granted an injunction, although the defendant was an actual resident at Glenfield and his manufactory was there. It was dissolved on appeal, but reinstated and affirmed by the house of lords. The vice chancellor said, "that no man had a right to avail himself of a trademark, or to adopt any other means,

^{*} Affirmed in 51 N. Y., 189.

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whereby he should induce people to purchase his goods under the belief that they were purchasing the goods of another man," and he was of opinion that "the defendant had pursued that course with the deliberate and fraudulent intention of palming off his starch upon the public as the starch of the plaintiff, and acquiring a sale of his starch by means of the connection and reputation of the plaintiff."

In Newman v. Alvord, 49 Barb., 588, it appeared that the plaintiffs for thirteen years had carried on business at the village of Akron, in the county of Erie, where they manufactured and sold cement, or waterlime, which they designated as "Akron cement" and "Akron water-lime." The defendants manufactured an article in Onondaga county, which they labeled "Alvord's Onondaga Akron cement or water-lime, manufactured at Syracuse, New York." They were perpetually enjoined from using the word "Akron" on their bills and labels, or in any other way in connection with the manufacture or sale of their cement or lime. The judgment awarding the injunction was affirmed at the general term, and also by the commission of appeals.

As a general rule geographical names cannot be appropriated as trademarks, but the rule has its exception where the intention in the adoption of the descriptive word is not so much to indicate the place of manufacture as to intrench upon the previous use and popularity of another's trademark.

The order appealed from should be modified and the injunction extended so as to prohibit the use of the words "Worcestershire Sauce" on the bills, labels

and wrappers of the defendants.

Brady, J., concurred.

Rickard's Case.

RICKARD'S CASE.

Supreme Court, Third District; Special Term, October, 1873.

GUARDIAN AND WARD.—NOTICE.—REMOVAL OF GUARDIAN.—DISQUALIFICATION.

Where a county judge and surrogate has appointed a general guardian of an infant, without notice to the relatives of the infant residing in the county, and it appears that the relatives would have opposed such appointment had notice been served upon them, this court will, upon application, remove such guardian and appoint a new one.

A guardian should not purchase the dower interest in the lands of his ward, or remove a cloud upon the title of the lands of a ward, without proper application to the court and obtaining an order therefor.

The sole executor of the estate of a deceased father is not a proper person to be appointed the general guardian of his orphan child, as it might lead to a gross wrong.

This was an application by relatives of Catherine M. Rickard, a minor under fourteen, for the removal of a guardian appointed by the county judge of Schoharie county, and for the appointment of another guardian, and for an accounting of the present guardian, and for any other or further relief which the court may direct.

The petition was made by the uncles and aunts of the minor, who were fifteen in number, and were the nearest of kin.

The residence of the minor and of thirteen of the petitioners was Schoharie county, all of whom resided in said county at the time of the appointment of the guardian by the then county judge.

Rickard's Case.

William Rickard, the father of the minor, died in February, 1871.

By his will, the title of his real property, valued at about fourteen thousand dollars, vested in the minor, provided, however, that if she "die and leave no children or issue, then, and in that case," the said lands were devised to two nephews.

On February 18, 1871, Mr. Becker was appointed general guardian of the minor, by the then county judge of Schoharie county.

On March 13, following, letters testamentary were issued to Mr. Becker, as the sole executor of the will of said William Rickard. Up to February 13, 1873, no inventory or account had been filed by Mr. Becker, as guardian. As executor, he filed an inventory, September 30, 1872, more than eighteen months after letters were issued to him.

The grounds of the application for removal appear in the opinion.

- G. L. Danforth and Wm. H. Engle, for the petitioners.
- L. Sandford and Mayham & Krum, for the guardian.

Danforth, J.—[After stating the facts above.]— The guardian paid to the widow of Mr. Rickard, the stepmother of the minor, three thousand three hundred dollars, for the release of her dower, &c.

This was done without an application to the court, although it appears that the guardian had had some consultation with the county judge, upon the subject. The practice is reprehensible of acting upon a casual remark of the county judge, in so important a matter.

It should have been done by petition to the court, setting up all the facts, and after a full examination of

Rickard s Case.

the facts and circumstances, obtaining an order authorizing the purchase of the real estate or the removing of a cloud upon the title of the lands of the ward.

Were this the only error of, or subject of complaint against, the guardian, it might be overlooked in this case, as it does not appear that the transaction was disadvantageous to the minor, nor that it was tainted with bad faith, except that it was a link in the chain, most of which the guardian forged, by which he holds this child and her property.

We have in this case, also, the fact that the sole executor of the estate of William Rickard becomes the guardian of his only child, a minor, and thus as executor, is only to account to himself, the guardian.

To say the least, this relation is of doubtful propriety, and considering the age of the ward, might lead to a gross wrong.

Mr. Becker, knowing that he was the executor, and before it was known, even to the stepmother, that there was a will, induced Mr. Best, an uncle by marriage, by promise that if he, Becker, should be appointed guardian, Mrs. Wainwright, a maternal aunt, should have the care of the child, and that with him as guardian, the maternal aunts and uncles would be all right, to go hastily to the county judge, and plead for his appointment.

This result was, that, when a day or two afterwards, the stepmother, believing there was no will, went to the county judge, to obtain the appointment of an administrator, she signed a petition for the appointment of Mr. Becker, as general guardian.

She says that when she heard that Mr. Becker was appointed guardian, she did not know that she had been instrumental in his appointment, nor had signed a petition for his appointment as guardian.

When Mr. Best returned from his mission to the office of the county judge, he says Becker met him at

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the depot, at Middleburgh, at night, and expressed much pleasure at what Best had done, and said to him, "Don't tell any one, not even your wife, for it may leak out, and the other relations get hold of it, and oppose my getting the appointment."

This, taken in connection with the fact that no notice of any kind, of the proposed appointment, was given to any of the relatives, and that that all the relatives swear that if they had had notice of the application, they would have opposed the appointment of Mr. Becker, who is a stranger to the child, amounts to a fraud upon the child, the relatives, and the court, and demands his removal.

It was conceded upon the argument that all the relatives of the minor are of the highest respectability.

This court cannot sanction the appointment of a general guardian, without first giving the relatives of the minor residing in the same county, and especially persons of the high character and standing of the relatives of this child, notice of the application, to the end that they may be heard in regard to the subject.

In this case the child is an orphan. None of her blood, or that of her father or mother, flows in the veins of this guardian.

The stepmother was not a relative. Her pecuniary interests were in antagonism to those of this minor.

The petitioners in this matter, being the nearest relatives of the child, now ask that the wrong perpetrated be made right, by the removal of the guardian, and that a proper appointment be made by this court.

The maternal and paternal relatives desired a guardian taken from their side respectively, but after consultation with the relatives on both sides, I have concluded that the best appointment in this case, is that which I have decided to make, and with it, I understand the relatives to be satisfied.

Rickard's Case.

An order must be entered, vacating the letters of guardianship, and removing the said Becker as general guardian of said Catherine M. Rickard, and directing that said Becker appear before Wm. H. Young, Esq., who is appointed a referee to take and state the accounts of said Becker, as such guardian, at such time and place as shall be fixed by said referee, and report same to this court, and also to ascertain and report to this court the amount which should be allowed the respective parties for their costs and expenses of these proceedings, and who, in his opinion, should pay the And appointing Albert Rickard, a paternal uncle, farmer, guardian of the real and personal estate of said minor, upon his executing a bond to said minor, in the penal sum of seven thousand dollars, with sureties to be approved as to its form, and as to the sufficiency of the sureties, by a justice of this court, and which, when so approved, shall be filed with the clerk of Schoharie county, and that, upon the confirmation of the report of said referee, the said Becker deliver within ten days thereafter on demand, to said Albert Rickard, all the property, real and personal, belonging to said ward, in his possession, or under his control, or which shall be found due to said ward, or belong to said ward. And appointing Joseph Mattice, farmer, a maternal uncle of said infant, guardian of the person of said infant, and that the said Becker deliver to said Matttice, the custody of said minor, with her personal effects, on demand, after the said Mattice execute a bond to said infant, with sufficient sureties, to be approved in the same manner as the other bond above named, is directed to be approved, and that the last mentioned bond be in the penal sum of seven thousand dollars, for the faithful performance of the duties of the said office, the said bond to be filed with the clerk of Schoharie county.

Williams v. Willis.

WILLIAMS against WILLIS.

Supreme Court, Second Department; General Term, February, 1873.

PLEADING. — COUNTER-CLAIM.—STATUTE OF LIMITATIONS.

To render the statute of limitations available as a bar to a counterclaim, it must be pleaded, by reply.

An amendment cannot be allowed on appeal, so as to sustain a judgment for plaintiff, in such case, if he neglects to reply.

Smith Williams sued Benjamin A. Willis for money received; and the defendant's answer interposed, as a counter-claim, a demand for a sum for services rendered. The reply was a mere denial of the answer.

On the trial evidence was offered by defendant of the services alleged, which it appeared were rendered more than six years before the action was brought.

The referee decided "that all the services rendered by the defendant more than six years previous to the commencement of this action, if not previously paid for, were barred by the statute of limitations, and that the defendant could not recover for the same by way of counter-claim in this action; although the reply did not set up the statute.

Henry Whittaker, Jr., for defendant, appellant:
-Relied on Clinton v. Eddy.

Wm. C. Carpenter and David McAdam, for the respondent:—Insisted that the ruling that the services rendered more than six years prior to the commencement of the action were outlawed was correct (Adams

Williams v. Willis.

v. Fort Plain Bank, 36 N. Y., 255). It was not necessary to plead the statute in the reply, but only in an answer (Code, § 74), and even if it was, it may be amended on appeal in support of the judgment (Code, § 173; Foote v. Roberts, 7 Robt., 17; Bowdoin v. Coleman, 3 Abb. Pr., 431; Harrower v. Heath, 19 Barb., 331; Cady v. Allen, 22 Id., 388, and so on appeal to the court of appeals; Bate v. Graham, 11 N. Y. [1 Kern.], 237).

By the Court.*—Tappen, J.—The plaintiff's action was for money had and received. The defendant pleaded a counter-claim for services exceeding in value plaintiff's demand, and the plaintiff put in a reply in which he did not set up the statute of limitations as to the counter-claim. At the trial it appeared that certain of the services were rendered by defendant more than six years before the bringing of the action, and the referee held them barred, and that the reply did not need to set up the statute; and this is the chief question to be considered.

The point was presented in Clinton v. Eddy, 54 Barb., 54, where plaintiff had neglected to put in any reply, or to set up the statute of limitations against a counter-claim, and where, on a trial of the case before a referee, the plaintiff also argued against the necessity of such a plea, and omitted to move to amend. After judgment, the plaintiff moved to open judgment and for leave to reply, &c., which was denied.

Where the counter-claim constitutes a cause of action against a party, the lapse of time is not a bar unless the party chooses to make it so, and pleads it.

A counter-claim is in the nature of a cross action on which defendant may have affirmative relief against the plaintiff (Fettrech v. McKay, 11 Abb. Pr. N.S., 453;

^{*} Present, BARNARD, GILBERT and TAPPEN, JJ.

Voorhees v. National Citizens' Bank.

S.C., 47 N.Y., 427). By section 153 of the Code it is provided that the plaintiff's reply to new matter may be by general or specific denial thereof, and he may set up any new matter constituting a defense to the new matter in the answer. The plaintiff in this case omitted in his reply to frame his pleading according to these provisions. His counsel now asks the court at general term to cause the pleading to be amended in accordance with the practice sometimes followed in other cases cited in the brief.

In the case above cited in 54 Barb., the court held such relief improper; particularly where, as here, the plaintiff refused or neglected to meet the question of amendment at the trial, and it is therefore no case of surprise or inadvertence.

The judgment will be reversed and new trial ordered

at circuit.

Costs to abide event.

VOORHEES against NATIONAL CITIZENS' BANK.

Supreme Court, First District; General Term, February, 1872.

BILLS, NOTES AND CHECKS .- COSTS ON NEW TRIAL.

A bank having once made a loan to A. on a note, and the loan having been paid and the note returned, B., who meanwhile had become owner of the note, went with A. to the bank and asked for a second loan thereon to A. in a limited amount. Held, that this request was not equivalent to notice that B. was the owner of the note, and the bank could hold the note for further advances made on the faith of it to A.

Voorhees v. National Citizens' Bank.

When a new trial is granted on the ground that the verdict or report on questions of fact is against the weight of evidence, it must be on payment of costs.*

The plaintiff, James C. Voorhees, as assignee of one Crawford, sued defendants to recover a part of the proceeds of a note which had been lodged with defendants as collateral to a loan, and had been collected by them under the following circumstances:

The note was made by one Smith for three thousand seven hundred and fifty dollars, payable to the order of Devereux, Rich & Co., who held it, and lodged it with the defendants as collateral to a loan, which they afterward paid, and received back the note some time before its maturity. They then indorsed and transferred the note, for value, to Crawford. He subsequently lent them the note again for the purpose of enabling them to obtain a loan thereon to the amount of three thousand dollars. Crawford testified as a witness, that on the occasion of the second loan, he took the note and went to the bank, in company with Mr. Devereux, of the firm of Devereux, Rich & Co., and asked the president to lend the firm three thousand dollars on the note, and Mr. Devereux gave his check attached to the note, and the loan was accordingly made.

Deverenx, Rich & Co., did not repay the loan, and became further indebted to the bank, and agreed with the bank that the note might remain as collateral to secure their whole indebtedness.

The note was finally collected by the bank, and they claimed to apply the entire proceeds on the indebtedness of Devereux, Rich & Co. Crawford claimed that they could only apply three thousand dollars in

^{*} To the same effect is Wilson v. Lester, 64 Barb., 431. In Went worth v. Candee, 17 How. Pr., 405, it was held that the costs in such cases should abide the event, and that rule has been applied frequently in other cases where the point has not been raised.

Voorhees v. National Citizens' Bank.

this manner; and assigned his claim to the plaintiff, who thereupon brought this action.

The referee found for plaintiff; and defendants appealed.

- H. P. Allen, for defendants, appellants.
- R. W. Andrews, for plaintiff, respondent.

BY THE COURT.—INGRAHAM, J.—The evidence shows that the note in question was the property of Devereux, Rich & Co., when first left with the bank.

It is a matter of doubt when the interest in the note was transferred to Crawford. The referee finds it was so transferred before it became due.

Whether that is so or not, there is no sufficient evidence of any notice to the bank, after the note passed into their possession on the second loan.

If after that second loan the bank advanced money on the note as security, having received the note from Devereux, they had a right to suppose the firm still to be the owner.

The mere fact of Crawford going with Devereux, and asking for such a loan, was not notice.

It may be, on another trial, that the plaintiff may be able to prove that there were other facts from which such notice may be inferred, but as the case now is presented to us, we think the finding on this point is against the evidence.

Where a new trial is granted on the ground that the verdict or report is against the weight of evidence, the same is to be on payment of costs.

New trial granted on payment of costs of the trial before the referee and of appeal.*

^{*} The question of costs was raised on the settlement of the order

by the appellant's counsel, who insisted that they ought to abide the
event; but the court held that decision was right, and settled the
order as above.

Wade v. Kalbfleisch.

WADE against KALBFLEISCH.

Brooklyn City Court; Special Term, October, 1873.

ABATEMENT AND CONTINUANCE.—BREACH OF PROMISE.

A cause of action for breach of promise of marriage does not survive the death of the defendant, occurring while the action is undetermined; and such action cannot be continued against the executor or administrator.*

The causes of action which, under the statutory modifications of the common law, survive the death of the party, are those which concern property. The action for breach of promise, though in form on contract, is strictly personal, and can neither be assigned nor survive.

This action was brought to recover damages for the breach of an alleged promise of marriage. The complaint set forth the contract, and charged the defendant with the breach of it. The answer, claiming that the undertaking of the defendant was conditional, admitted the refusal to marry, and set up special matter in justification. After the issue thus joined had been noticed for trial and the case put on the calendar, the defendant died.

The plaintiff now applied to have the action continued against the executors.

Daniel L. Norton, for the plaintiff.

William A. Beach and Edgar Cullen, for the executors.

Neilson, Ch. J. [After stating the facts.] Section 121 of the Code, under which this application is made,

^{*} Otherwise after verdict (Wood v. Phillips, 11 Abb. Pr. N. S., 1).

provides that no action shall abate by the death of a party, if the cause of action survive or continue; and that the court may, on motion, allow the action to be continued by or against the representatives.

The question is, whether a cause of action of this peculiar character dies with the person of the defendant, notwithstanding the breach committed in his lifetime. In the absence of any known judicial determination by the courts of this State, the question is worthy of serious consideration.

Causes of action arising on contracts, strictly so called, survived at the common law; but the maxim, actio personalis moritur cum persona, applied to claims sounding in damages for wrongs suffered by either party. In its application to causes of action arising for wrongs in respect to property, that maxim was inequitable. It worked out a discharge, by the death of the wrongdoer or of his victim, in many instances in which the courts could not, however strongly favoring an assumpsit, give relief. This consideration, and the consequent disfavor with which that rule was regarded, led to its reformation in England by an equitable course of legislation commencing at an early day. In some of our sister States that rule has been further reformed, and in this State statutes have been enacted from time to time, enlarging the class of causes of action which survive, until the maxim as to personal claims dying with the person, applies only to claims for naked deceits, and for injuries to the person or character (Haight v. Hoyt, 19 N. Y., 464; McKee v. Judd, 12 Id., 622; Yertore v. Wiswall, 16 How. Pr., 8; Smith v. New York & New Haven R. R. Co., 16 Id., 277; Fried v. New York Central R. R. Co., 25 Id., 285; Elder v. Bogardus, Hill & Den. Supp., 116: Dininny v. Fay, 38 Barb., 18.)

The theory is that, as the personal representatives take as assignees of the deceased, the causes of action

which survive are such as may be considered credits, rights or interests in the nature of property, capable of being transferred. Where the party injured may have his action against the executors or administrators, the claim arises from some affirmative wrong, breach or neglect of duty in respect to property by the deceased. The principle favoring the liability and reparation is the same whether the action be by or against the personal representatives (38 Barb., p. 21 of op.; 19 N. Y., 464).

But none of those remedial statutes provide for continuing a claim or reviving an action for damages for wounded pride or mental pain or suffering. No wellconsidered case in the books, English or American, no respectable dictum, favors such an innovation. The line of demarcation between such claims and those which have to do with property is clearly defined, has been consistently observed. As illustrative of this view, the argument in favor of the assignability of the claim for which by statute the personal representative of the deceased may have an action where the death was caused by a wrongful act, neglect or default, has been predicated upon the fact that the recovery is limited to the pecuniary loss—damages recognized as property (16 How. Pr., 8: 15 N. Y., 432). In the latter case Judge Comstock, in supporting the right to assign such a claim, and in answering the strongest objection that could be made to such right, says: "Neither the personal wrong nor outrage to the decedent, nor the pain and suffering he may have endured, are to be taken into the account." If we could thus eliminate the claim for a breach of promise of marriage, nothing tending to support an action would remain.

The Massachusetts statute of 1842 (ch. 89, § 1), furnishes an instance of extreme legislation. It provides that the action of trespass on the case for damages to the person shall survive. But that statute has received

a clear interpretation. It has been held that it extends only to damages for injuries of a physical character (1 Cush., 412; 4 Id., 408). Thus construed, the idea of redress for claims affecting property is not lost sight of. It may have been considered that one upon whom a personal injury is inflicted suffers in his estate. It is to be hoped that a like provision will be incorporated in our statutes now being revised.

With us, marriage, "so far as its validity in law is concerned," is a civil contract (3 Rev. Stat., 5 ed. p. 227, § 1). The engagement, or promise of marriage, is of course, a mere contract. But such contracts, the one consummated, the other executory, are in many respects unlike other contracts. Thus in the former condition the relation can not be dissolved by the act of the parties (4 N. Y., 230); and the legislature in authorizing its dissolution does not violate the constitutional provision which prohibits laws impairing the obligation of contracts (White v. White, 5 Barb., 474). In the latter condition the property of the party in default cannot be attached under that provision of the code which gives such a remedy against a contractor (1 Lans. 268); and the grounds of defense on the trial of the action for the breach of the promise, and some of the elements affecting the question of damages, are not known to other cases on contracts (5 Abb. Pr. N. S., 29).

In Homan v. Earle, an action for a breach of promise of marriage tried in this court (reported 13 Abb. Pr. N. S., 402), and at its last term affirmed by the court appeals, I said in my charge to the jury that "cases of this kind in their first view and progress are regarded simply as matters of contract, but in respect to the question of damages, the character of the action changes, it takes to itself the peculiarities and elements of a personal injury, and that gives greater freedom and latitude in fixing the damages."

As to the measure of damages, this action has always been classed with actions of tort (Per Earl, J., 42 N. Y., p. 277 of op.); the indignity, contumely, mental agony, and the disgrace may enhance the damages (Per Allen, J., 24 N. Y., 252).

It is apparent that, as this action has relation to a contract, also to a wrong, some attention to both branches of the law and to the statutory modification of the common law is called for in considering this application. It is, on the whole, equally apparent that the engagement to marry is to be distinguished from other contracts; that in its nature, and in the sense of our statutes, it has no relation to property, and that a cause of action for the breach of the promise does not survive, or, using a correlative term, is not assignable. The promise of marriage is merely personal; the action for the breach of it seeks redress for disappointed hopes, wounded pride, humiliation, for the loss of coveted society and protection; it may be for the loss of happiness.

In Hodgman v. Western Railroad Corporation (7 How. Pr., p. 494 of op.), Mr. Justice Harris took occasion to say, by way of illustration, that a cause of action for a breach of promise of marriage can not be transferred. Mr. Parsons accepts the rule that the action does not survive against the administrator of the promiser (2 Con., p. 70). The late Judge Denio, would seem to have entertained the like opinion (13 N. Y., 333). It is also worthy of notice that the commissioners, in their proposed revision of our statutes, expressly include the cause of action for such breach of promise among claims for wrongs not assignable.

But, while this has been regarded as an open question with us, it has been determined in England and in some of our sister States with special reference to the

nature of the engagement and of the remedy, and upon principles applicable to our statutes.

In Chamberlain v. Williamson (2 Maule & S., 408), the plaintiff had a verdict, but judgment was arrested, on the ground that the claim did not pass to the personal representative. Lord Ellenborough held that the cause of action which the plaintiff's intestate had for the defendant's breach of promise of marriage, could not be considered as an increase of the individual transmissible estate.

In Stebbins v. Palmer (18 Mass., 71), the action was by Julia Palmer against Benjamin Stebbins for breach of promise of marriage, and Stebbins having departed this life, she, claiming to be a creditor with an interest in the estate, sought to have administration. Letters were granted by the judge of probate. The question was whether the applicant had a suit pending upon a cause of action which by law survived, or a demand in the nature of a debt. It was held that she had not, and the probate decree was reversed.

Smith v. Sherman (58 Mass., 408), a like action, presented the same question, and the decree of the judge of probate, granting letters, was reversed. In this case the determination of the court in Stebbins v. Palmer was approved. In each case the general doctrine was fully considered, and the conclusion reached that the claim for the wrong suffered from the defendant's breach of the promise did not survive.

In Lattimore v. Simmons (13 Serg. & R., 184), the defendant, Rogers, having died, his executors were substituted, and on the trial the plaintiff had a verdict. The principal error assigned, or exception taken, was as to the cause of action having died with the defendant. In delivering the opinion of the court reversing the judgment, Chief Justice Tilghman said: "No benefit accrued to the the estate of Rogers by the mutual promises in this case. Neither had the plain

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tiff any interest of the nature of property after the breach of promise, although she had a right of action."

The point was noticed in Moore v. Jones (23 Vt., 739), a case in bankruptcy, the question being on the construction of the act of Congress as to the property or effects of the bankrupt which, being assignable, would pass to the assignee. Judge Prentiss says that "While the act does not extend to rights of a mere personal nature, as claims for damages arising out of a breach of promise to marry, or out of personal torts and injuries, it comprehends every right and interest, and every right of action founded on or growing out of property." This case, though not an authority on the question before me, is of interest as illustrating the consistency with which the distinction between causes of action strictly personal and claims which have some relation to property has been observed.

The application must be denied.

BRAGELMAN against BERDING.

New York Common Pleas; Special Term, May, 1873.

APPEARANCE.—EXTENSION.—STAY.

The court ought not to grant an extension of time to appear, nor should it grant a stay of proceedings on the application of a defendant who has not appeared in the action.

Motion for a stay of proceedings, &c.

The facts are stated in the opinion.

J. F. DALY, J.—The defendant is an alien, and

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while on a visit to this country committed the acts upon which the plaintiff's alleged canse of action arose. The summons was served upon him in this city, and immediately afterwards he left the State and subsequently the country. The moving papers state that he desires to have this cause removed to the circuit court of the United States, and to serve his petition to that effect, and for that reason has asked and obtained from this court an extension of time to appear as well as to answer. It seems that the application for removal is to be made under the act of 1789, which requires the application for removal to be made at the time of the appearance of the defendant, and not under the act of 1866 or of 1867, providing for a removal at a subsequent stage of the action. I do not know of any practice which permits an extension of time to appear. Extensions of time to answer or to demur may be granted, and it has been held that applying for and obtaining time to answer did not amount to a general appearance, and the causes were removed (Disbrow v. Driggs, 8 Abb. Pr., 305).

The application for an extension of time to answer may therefore, it would seem, be made without prejudice to the right of removal at the time of appearing, but there is no authority for a stay of proceedings if such extension be not granted. The plaintiff claims that the defendant has already appeared in the action. That question will be material to be considered in the event of his presenting a petition for removal of this cause. Upon the papers I shall give defendant twenty days' further time to answer or demur; but that is all that I have power to do in the premises.

they man

WHEELOCK against LEE.

City Court of Brooklyn; General Term, November, 1873.

SUFFICIENCY OF COMPLAINT.—INJUNCTION IRRESPEC-TIVE OF CODE.—USURY.—TORTIOUS POSSESSION. —DEMAND.—RIGHTS OF ASSIGNEE.

-JURISDICTION

In an action brought by an assignee in bankruptcy, the courts of a State will take judicial notice of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States, passed March 2, 1867;" and the allegations in the complaint that the insolvents were adjudged bankrupts "pursuant to said act," and "the plaintiff in like manner appointed assignee in bankruptcy of said bankrupts," set out the appointment of the assignee with sufficient particularity.*

Uunder the Revised Statutes, a person giving securities upon a usurious loan is entitled to an injunction restraining their prosecution, irrespective of section 219 of the Code.

Section 3 of the title of the Revised Statutes in relation to "the interest of money" is remedial, not penal.

The possession of securities received as collateral to a usurious loan, is not a lawful, but a tortious possession. The title remains in the borrower; and no demand for them is necessary before commencing suit to enjoin their prosecution or to compel their surrender.

The right to recover back money paid for a loan in excess of legal interest is not limited to the borrower. The injury done by the usurer is an injury to the estate of the borrower; and the right to recover back the amount of interest in excess of the legal rate passes to the assignee in bankruptcy.‡

An action brought to recover the excess of interest, and collateral securities, received in violation of the statute in relation to usury

^{*} S. P., Platt v. Crawford, 8 Abb. Pr. N. S., 297.

[†] Compare Mayor, &c. of N. Y. v. Erben, 3 Abb. Ct. App. Dec., 255.

[‡] Compare Palen v. Johnson, 50 N. Y., 49; affirming 46 Barb., 21; Gerwig v. Shetterly, 64 Barb., 620.

is not a local action. The right can be enforced wherever courts have jurisdiction of the persons of the parties.

An appearance by a defendant generally, in an action, waives any want of jurisdiction in the court over his person.

Appeal from an order of special term granting a preliminary injunction.

The plaintiff in this action, Adam D. Wheelock, as assignee in bankruptcy was the personal representative of bankrupt firm, C. M. Tremaine & Bro. The complaint alleged, in usual form, several usurious transactions between Henry M. Lee, the defendant, and said firm, within one year past, wherein the defendant in pursuance of a corrupt agreement took and received certain sums of money, for the loan of moneys, which were more than at the rate of seven per cent per annum on the amount loaned. It also set forth that the defendant had in his possession a usurious note for twelve hundred dollars, together with seven other notes given by said bankrupts at different times and held as collateral securities for said usurious loans.

The plaintiff demanded judgment for the recovery of the usurious amounts of money received for said loans; the delivery of the twelve hundred dollar up note to be canceled as void, and the delivery to the assignee of the collateral notes, and that in the mean time the defendant be enjoined from collecting or parting with said collateral notes. The preliminary injunction was granted, and the defendant appealed from said order to the general term.

Geo. W. Van Slyck, for defendant and appellant.—
I. To authorize an injunction, plaintiff must show its necessity under § 219 of the Code* (Gentil v. Arnand, 38 How. Pr., 94; Hartt v. Harvey, 32 Barb., 55; S. C., 10 Abb. Pr., 321; Reubens v. Joel, 13 N. Y., 488; Powers v. Alger, 13 Abb. Pr., 284, 475; Thompson v. Matthews, 2 Edw., 212).

^{*} Affirmed in 1 Sweeny, 641.

II. The complaint does not contain the allegations necessary to show the right of the plaintiff to sue (Mc-Laughlin v. Nichols, 13 Abb. Pr., 244).

III. The right to recover back interest or collateral securities is a personal right, and cannot be assigned (Draper v. Trescott, 29 Barb., 407; Nichols v. Bellows, 22 Vt., 586; Bullard v. Raynor, 30 N. Y., 197; Sands v. Church, 6 N. Y., 347; Boughton v. Smith, 26 Barb., 635; Potter v. Cogswell, 4 N. B. R., 19; Re Griffiths, 3 Id., 179).*

IV. A demand was necessary to enable plaintiff to bring this suit (Boughton v. Bruce, 20 Wend., 234; March v. Wyckoff, 10 Bosw., 206).

V. This action is within section 123 of the Code, and the court has no jurisdiction (Frees v. Ford, 6 N. Y., 176; Harriott v. N. J. R. R., 8 Abb. Pr., 284; Landers v. Staten Island R. R., 14 Abb. Pr. N. S., 346; Dudley v. Mayhew, 3 N. Y., 9).

B. E. Valentine, for plaintiff and respondent.—
I. It is not requisite that a *final* injunction should be part of the relief demanded (Vermilyea v. Vermilyea, 14 How. Pr., 470).

II. This action is brought under the Revised Statutes part 2, chap. IV., title III., and not under section 219 of the Code.

III. To show the standing of the assignee it is only necessary to allege the fact of his due appointment; and not the evidence of the fact (Cruger v. Halliday, 3 Edw. Ch., 570; Platt v. Stout, 14 Abb. Pr., 178; People v. Ryder, 12 N. Y., 433).

IV. The title to all the property remained in the bankrupts and passed to the assignee (Meech v. Stoner, 19 N. Y., 26; Thomas v. Watson, Taney, 305).

V. Any jurisdictional irregularity was cured by general appearance.

^{*} See also Freeman v. Auld, 44 N. Y., 50; Williams v. Tilt, 86 Id., 819; Chamberlin v. Dempsey, Id., 144.

McCue, J.—The plaintiff is the assignee in bankruptcy of C. M. Tremaine & Bro., and brings this action to recover from the defendant:

1st. Several sums of money paid by C. M. Tremaine & Bro. to him as usury; and,

2nd. To restrain the collection and negotiation of certain promissory notes held by defendant, and made and delivered to him as collateral security for divers usurious loans.

Upon application of the plaintiff an injunction was granted at special term restraining the defendant from selling or disposing of the notes referred to, or the proceeds thereof, or from collecting the same.

The defendant appeals from this order. The motion for the injunction was argued upon the complaint and the affidavit of one of the insolvents. So that the case comes before us on appeal practically as though a demurrer had been interposed that the complaint did not set forth facts sufficient to constitute a cause of action.

The objection that the appointment of the plaintiff as assignee was not sufficiently set out in the complaint, is not well taken.

This court is bound to take notice of the act of Congress entitled "An act to establish a uniform system of bankruptcy through the United States, passed March 2, 1867," and the allegations in the complaint that "the insolvents were adjudged bankrupts pursuant to said act," and "the plaintiff in like manner appointed assignee in bankruptcy of the bankrupts," are sufficient, in view of the fact that in the absence of an answer raising an issue upon this point, all the presumptions are in favor of the regularity of the bankrupt proceedings.

There is no force in the objection that the injunction was improperly granted under section 219 of the Code.

The bankrupts were entitled to have the collection

or prosecution of these notes enjoined, "whenever it should satisfactorily appear to the court by the admission of the defendant or by proof that they had been received in violation of the statute" in relation to usury; and this without reference to section 219 of the Code.

Here it appeared, practically as an admission of the defendant, that the notes had been received as alleged in the complaint (3 Rev. Stat., 5 ed. 73, 74).

These seem to have been the only points made on the hearing at special term, but now for the first time a question is raised that the plaintiff as assignee does not stand in the bankrupts' shoes, and can not avail himself of the provision of the statute in relation to usury above referred to. The earlier authorities would seem to support this position (22 Vt., 536; 26 Barb., 636; Boughton v. Bruce, 20 Wend., 234).

We must, however, regard the reasoning in the case of Meech v. Stoner, 19 N. Y., 26, arising under the statute in relation to gaming, as peculiarly applicable to the case under examination. As declared by the court "the assignability of things in action is now the rule; non-assignability the exception." The statute against gaming gave to the person losing, the right within three calendar months to sue for and recover back the money lost (Rev. Stat., part 1, title 8, art. 3, ch. 20, § 14), and if he failed to commence such an action the overseers of the poor were authorized to commence suit, and recover the sum lost with treble the sum for the benefit of the poor (§ 15).

The English statute giving the loser the right to recover money lost at gaming, has been held as to this to be remedial and not penal (Turner v. Warren, 2 Strange, 1079), and the reason for this is well stated by Sir William Blackstone to be that as the receiving of the money is a nullity, "the money is still to be regarded as the property of the loser."

In Meech v. Stoner, the plaintiff was the assignee of one Gould, who had lost fifteen hundred dollars at faro, and which was won by the defendant Stoner.

The court discussed and distinctly overruled the principle contended for that the right to sue for and recover the money lost was a mere personal privilege, and that the loser had no interest in the money sued for which was capable of assignment so far as to give the right of action to any one else.

Under our statute against usury, the right to recover back money paid in excess of lawful interest, is not only given to the person paying the same, but also to his personal representatives, and not only against the person who has unlawfully received the money, but against his personal representatives, also, thus clearly treating the money paid in excess of lawful interest as part and parcel of the debtor's estate, and the obligation to return, as not only binding upon the usurious creditor as a moral duty, but also as constituting a legal charge upon his estate; in other words it treats the usurious consideration exacted as still the debtor's property, and improperly obtained by the creditor.

The case of Boughton v. Bruce, 20 Wend., 234, is relied on as authority for the proposition that the possession by the creditor, the defendant, of the notes, recovery of which was sought, was not unlawful or tortious because the notes were delivered to him by the plaintiff himself. It must be observed, however, that this was an action of replevin in the detinet, and the case turned upon the point whether the demand had been made before or after the actual commencement of the suit. The point was taken that no demand was necessary, but it does not seem to have been urged upon the attention of the court, and the point was determined without any serious discussion of the principle involved. Whatever force this decision might

otherwise be entitled to, it was subsequently overruled as an authority in Schroeppel v. Corning, 5 Denio, 239, the court holding that the possession of securities delivered upon a usurious contract, although acquired by a manual delivery from the plaintiff, is not a rightful possession, and that no demand was necessary.

For these reasons we are compelled to depart from the rule heretofore laid down, and to hold that this action is properly brought by the assignee of the parties who have paid the usurious consideration. The statute does not permit the recovery of all the money paid or value delivered for interest, but only of so much as is in excess of the legal rate of interest; a fact which it is important to bear in mind in determining the character of the statute, whether it should be considered as a *penal* one or simply remedial in its nature.

The distinctions above pointed out as marking the remedial character of the statute under which this action is brought, furnish an answer to the objections raised to the jurisdiction of this court.

This action is not to recover penalties or personal property distrained for any cause, and does not come therefore within the provisions of section 123 of the Code.

The moneys and securities sought to be recovered are, in contemplation of law, the property of the plaintiff, lawfully representing the insolvents, and they follow his person, and the court has jurisdiction of the subject matter.

The defendant has appeared generally in the action, and has submitted himself and his rights to the jurisdiction of the court, and if there had been any irregularity in the service of process by which the defendant has been brought in, as a mere irregularity the defendant has waived it.

The order appealed from should be affirmed, with ten dollars costs.

REYNOLDS, J., concurred.

Order affirmed, with costs.

DEVLIN against THE MAYOR, &c., OF NEW YORK.

New York Common Pleas; Special Term, June, 1873.

EXTRA ALLOWANCE.—COSTS.—AUTHORITY OF COUNSEL TO AMEND THE PLEADINGS.

- The "further allowance" to be granted to a party under section 309 of the Code of Procedure, can only be allowed to parties who are entitled by right to the costs provided for in section 307.
- A defendant who obtains a judgment against a co-defendant does not recover costs as of course.
- A party claiming to be entitled to a share in a certain fund, brought an action to recover his share, and joined as defendants all other parties claiming shares in the fund, and he and such defendants recovered judgment for their shares. Held, that the further allowance of costs to be allowed to the plaintiff under section 309 of the Code of Procedure, could not be computed on the whole fund, but only on his share.

Held, further, that the defendants who had succeeded in proving their right to a share in the fund, were not entitled to any costs.

- The meaning of the words "recovery or claim" and "subject matter involved," as used in section 309 of the Code,—considered.
- The counsel who have charge of the trial of a case have authority to amend the pleadings at the trial, without the knowledge of the attorney of record.
- A plaintiff is not entitled to an allowance on defeating a counterclaim, in addition to an allowance on his recovery, if the counterclaim was defeated by the same evidence which was necessary to sustain his recovery.

The action was brought by the plaintiff to recover the sum of one hundred thousand dollars damages for breaches upon the part of the city, of what is commonly called the "Hackley Contract," an interest in which had been assigned to him.

The defendants, Anthony S. Hope, Thomas Hope, Samuel Donaldson, Tilly R. Pratt, and Charles D. Blish, were also assignees of interests in said contract, and were made parties defendants, upon the allegation that they refused to be made parties plaintiff.

The city of New York put it a general denial; and the other defendants put in answers claiming different interests in the contract.

The issues in the action were referred to Homer H. Stuart to hear and determine, and the order of reference further provided, that if the referee should decide that any money was due from the mayor, aldermen, and commonalty of the city of New York, that he should also determine to whom the same should be paid, and the rights and interests of the said plaintiff and the other defendants respectively in and to the sum of money so found due from the defendants, the mayor, &c.

During the progress of the trial of the cause about six hundred witnesses were examined, and the evidence, documentary and oral, amounted to seven thousand folios, the number of days spent in the trial of the cause was about two hundred, the counsel for the city consuming forty days in summing up the case, and the disbursements by the different parties interested in the contract, for counsel fees, referees' fees, witnesses' fees, and printing, amounted to the sum of thirty-six thousand dollars.

After the evidence had been closed, Mr. McKeon. one of the counsel who acted for the city upon this trial, and without the knowledge of the corporation counsel, moved for leave to amend their answer by

claiming a judgment against the plaintiff and the other defendants for the sum of one million two hundred and ninety-two thousand one hundred and fiftyfive dollars and twenty-three cents, damage which the city had sustained by the failure of the parties interested in the Hackley contract to keep its covenants. which motion was granted and an amended answer was put in before said referee, signed with the name of the counsel to the corporation, all which was done without his knowledge or consent. The case was summed up by the counsel, and the referee reported in favor of the plaintiff in the sum of forty-four thousand and forty-two dollars and eight cents,—of the defendants, Anthony S. Hope in the sum of fifteen thousand five hundred dollars,—of Thomas Hope in the sum of thirtytwo thousand five hundred dollars. -of Samuel Donald. son in the sum of one hundred and seventy-six thousand one hundred and sixty-nine dollars and ninety-four cents,—Tilly R. Pratt in the sum of forty-four thousand and forty-two dollars and forty-eight cents,-and Charles D. Blish in the sum of eighty-eight thousand and eighty-four dollars and ninety-nine cents, and disallowed the counter-claim of the city.

A motion was now made by the plaintiff and defendants, for an extra allowance under section 309 of the Code of Procedure.

Luther R. Marsh, Joseph J. Marrin, and T. C. Cronin, for motion.

Richard O'Gorman, Joseph H. Dukes, and William C. Trull, opposed.

VAN BRUNT, J.—This motion can be conveniently divided into three branches:

1st. The motion of the plaintiff for an extra allowance based upon his recovery.

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2nd. The motion of the defendants for an extra allowance based upon their recovery.

defeat of the counter-claim of the city. It does not require any argument to show that the plaintiff is entitled to an allowance upon the amount of the recovery had by him. The case was certainly difficult and extraordinary within the meaning of section 309 of the Code of Procedure.

The motion of the defendants for an extra allowance upon the amount of their respective recoveries presents a more serious question.

The brief submitted by their counsel seems to concede that if these defendants are not entitled to costs against their co-defendant they cannot claim an extra allowance. This seems to me to be a correct view, because section 309 provides for a "further allowance to any party." It is to be a further allowance, one which is to be added to some other allowance to which the party is entitled under previous sections of the Code.

It will be perceived that the words "to any party," are used to distinguish this allowance from those referred to under section 308.

The language of section 308 is, "In addition to these allowances," referring to the costs mentioned in section 307, "there shall be allowed to the plaintiff" certain sums. But the further allowance in section 309 is to be allowed to any party, thus allowing a defendant, if entitled to an allowance by way of costs, to have the benefit of the provision for an extra allowance under section 309, which he does not enjoy under section 308.

The real question then is, can a defendant who succeeds and obtains a judgment against a co-defendant, recover costs in an action at law.

Section 303 of the Code abolishes all statutes estab-

lishing or regulating the costs or fees of attorneys, and provides for certain allowances, as it calls them, to the "prevailing party."

Section 304 provides that costs shall be allowed of course to the plaintiff upon a recovery in several cases, among which is "In an action for the recovery of money," which is this case, "where the plaintiff shall recover fifty dollars,"

Section 305 provides that costs shall be allowed of course to the defendant in the actions mentioned in section 304, unless the plaintiff be entitled to costs therein. Thus it seems to me clear that although a defendant may be a prevailing party as against a co-defendant, yet there is no provision of the Code which authorizes him to claim costs, if the plaintiff is entitled to costs, because no defendant is entitled to costs, if the plaintiff has his costs. The language is, "Costs shall be allowed to the defendant" unless the plaintiff be entitled to costs. Therefore, if I am correct in the view that I have taken of section 309, that the allowance there mentioned is in addition to costs, the defendants, not being entitled to costs, cannot have the benefit of the provisions of that section.

It is claimed that under section 309 the court has power to make the allowance on the amount of the recovery or claim or *subject matter involved*, and that the amount of the recovery or claim and subject matter involved is the aggregate amount of all the recoveries.

In consequence of the manner in which the plaintiff brought this action, the whole subject matter involved was the amount of his recovery. Under section 119 he might have brought an action for the benefit of all the owners of the Hackley contract, and if he had done so, he would have been entitled to enter judgment for the whole sum, leaving the distribution among the parties entitled to future action; and it is truly said that if he had recovered the whole he might have had an allow-

ance upon the whole, and it would have come to the same thing as to give to each successful party an allowance upon the amount of his recovery. But the difficulty is that for some reason best known to himself he did not choose to bring his action in that form. He chose to involve in that litigation only his own interest in that contract, and his recovery has been limited to that.

The parties jointly interested with the plaintiff in that contract having refused to unite with him in bringing that action, and thus become plaintiffs and actors, and subject to the risks to which they would be exposed in case of defeat and having succeeded, cannot now claim the same advantages which would have accrued to them had they been actors in this action.

If the defendants, the city, had succeeded in this action, and had come to this court for an extra allowance as against the plaintiff, I am sure that he would have urged strenously that the subject matter involved was only the amount of damages claimed by him in his complaint, and that he should not be made to suffer because defendants had made claims against the city under the same contract, which had also been defeated.

There is another view to be taken of the language of that section, which is equally fatal to this claim.

The language of the Code is, the court may also make a further allowance to any party upon the amount of the recovery or claim, or subject matter involved. It is very evident from this language that the words "recovery or claim," are not synonymous with, nor intended to be used in the same or kindred sense with, the words "subject matter involved," but that the latter are intended to give the benefits of the provision for an extra allowance to a class of cases in which the recovery or claim would give no data whatever upon which to fix an allowance. The words "subject matter involved" refer to those cases in which the subject

matter involved in the action has a material existence: as, in the case of ejectment, the real estate sought to be recover; in replevin, the personal property sought to be recovered, the title to which is disputed. In cases of this description a judgment adjudging the title of the property to be in the plaintiff, which would be the recovery or claim, would afford no basis whatever upon which to fix an allowance, and consequently, it was provided that in such cases an allowance might be fixed upon the amount of the subject matter involved.*

We now come to the third branch of the case, and that is, can plaintiff have an allowance on the amount of the counter-claim interposed by the defendants, the mayor, &c., and which he has succeeded in defeating.

It is argued on the part of the defendant, the mayor, &c., that this counter-claim was improperly before the court, that it was put in without the consent or knowledge of the counsel to the corporation, who was the attorney of record.

It appears to me that it must be held that the counsel who has the charge of the trial of the case has the authority of the attorney of record, to make any motion which may appear to him necessary in the trial of the cause, to sign any stipulation, or to do any other act in the name of such attorney which in his judgment will benefit the cause of his client. If this is not the case, it would be impossible to proceed with the trial of any cause in the absence of the attorney of record. We must, I think, therefore assume that this counter-claim must treated in the same manner as though it had been put in by the corporation counsel himself.

Upon what theory can the plaintiff claim an allowance because of the defeat of his counter-claim. By \$ 309 his allowance is limited by his recovery or claim.

His recovery was the sum of forty-four thousand

^{*} Compare Burke v. Candee, 63 Barb., 552.

and eighty-two dollars and eighty cents, and that only, and in establishing his claim, to that extent he of necessity defeated the counter-claim. The counter-claim was founded upon the same contract for a breach of which the action was brought,—the city claiming that the contract was broken by the representatives of Hackley and not by themselves. The plaintiff claimed, and was compelled to establish, in order to succeed upon the cause of action alleged in his complaint, that such was not the case, that the representatives of Hackley had performed all the conditions of the contract upon their part, and that the city was in default. In such a case as this I can find no authority in section 309 for the granting an allowance based upon the defeat of that counter-claim.

The case is one which has been difficult and extraordinary. The time has been more than ordinarily protracted. The preparation has required a great amount of time and expense; but however much I might feel inclined to grant a more liberal allowance if I had the power, I feel that I cannot for the reasons stated grant a larger allowance that five per cent. upon the plaintiff's recovery.

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SHANKS' CASE.

Supreme Court, First District; At Chambers, October, 1873.

HABEAS CORPUS.—COMMITMENT.

A judge at chambers may issue a writ of habeas corpus, notwithstanding the court is at the time in session.

A person committed for contempt in one county and brought into

another county on habeas corpus ad testificandum, may be discharged there on a habeas corpus to inquire into the cause of his detention, issued by a justice of the supreme court in the latter county; and this notwithstanding the over and terminer of the former county is in session.

The provision of the habeas corpus act (2 Rev. Stat., 560, § 5),—that a prisoner committed on a criminal charge, and brought up on habeas corpus to testify, shall be discharged after testifying,—does not preclude the issue of a writ of habeas corpus to inquire into the legality of his commitment.

On habeas corpus the magistrate may inquire into the legality of a commitment for contempt, and if it is not according to law,—e. g., if it is for an indefinite time instead of limited to not exceeding thirty days,—may discharge the prisoner.*

The distinction between an informal and an illegal commitment,—explained.

A person adjudged to be in contempt, and taken to jail under a commitment which is illegal, cannot be held by subsequently making out a legal commitment.†

Mr. Wm. G. Shanks, city editor of the *Tribune*, was committed to the county jail by the over and terminer of Kings, for contempt in refusing to answer questions put to him before the grand jury as to the authorship of an article in the *Tribune*.

The next day he was taken by the sheriff to New York, pursuant to a writ of habeas corpus ad testificandum, and while there, his counsel obtained from Mr. Justice Fancher, at Chambers, in New York, a writ of habeas corpus, to inquire into the legality of his commitment in Kings county. When he was brought before Judge Fancher pursuant to this writ, the order or commitment (called "Exhibit A,") was produced. This paper, after reciting that he had been adjudged guilty of contempt, purported to direct that the prisoner stand committed till he should answer the question he had refused to answer.

An adjournment was then had till the next day. Dur-

^{*} S. P., Lagrave's Case, 14 Abb. Pr. N. S., 333, note.

⁺ Compare Matter of Barre, 14 Abb. Pr. N. S. 426.

ing the intervening time a new commitment was made out by the district attorney, with the additional words "not exceeding thirty days," which was signed by the judges, and delivered to the sheriff as the commitment under which he was to hold the prisoner; and on the adjourned day this commitment (called "Exhibit B,") was relied on in return to the writ.

Henry L. Clinton and C. A. Runkle, for prisoner.

Winchester Britton, district attorney of Kings, opposed.

FANCHER, J.—It will be proper to dispose of some preliminary questions before considering the merits of this matter.

1. During the proceedings it was objected by the district attorney of Kings county, that the writ of habeas corpus was improvidently issued by a justice of the supreme court when the court was in session. The statute under which the objection is made is itself an answer to the objection. It provides that application for the writ shall be made by petition, (1) to the supreme court during its sitting, or (2) during any term or vacation of the supreme court, to any one of the justices of the supreme court, or any officer who may be authorized to perform the duties of a justice of the supreme court at chambers, &c. The common practice in this district is to apply for the writ to the justice of the court, sitting at chambers, and the writs are uniformly granted on such application. It has never been doubted that such jurisdiction is conferred by the statute on a justice of the court, though a term of the court may at the time be held (Exp. Beatty, 12 Wend., 229; People ex rel. Trainer v. Cooper, 8 How. Pr., 288; People ex rel. Bentley v. Hanna, 3 Id., 39).

2. It is objected that the writ should have been made returnable in the over and terminer while it was

in session. The statute under which the objection is made (2 Laws of 1847, ch. 460, p. 599, § 27; same statute, 3 Rev. Stat., 5 ed. 1066, § 27) is not applicable to this case. It relates only to prisoners confined in the common jail of the county, upon a criminal charge. There is no pretense that the petitioner was actually or constructively confined in the common jail of New York county on a criminal charge.

- 3. It is further objected that the writ should have been returnable before some court or officer in Kings county. The objection is founded on section 38, formerly section 24, of the habeas corpus act (2 Rev. Stat., 564, § 24; same stat., 3 Id., 5 ed. 884, § 38.) It provides that whenever application for the writ be made to "any officer," not residing within the county where the prisoner shall be detained, he shall require proof that there is no officer in such county authorized to grant the writ. There are two answers to this objection. (1.) The petition on which the writ of habeas corpus issued, expressly averred that the petitioner was then "confined and restrained of his liberty by the sheriff of Kings county, in the court-house of the city and county of New York." (2.) If it be conceded that the imprisonment was constructively in Kings county, it has been held both at special and general term of the supreme court, that the section referred to does not apply to a justice of the supreme court: and that a justice of that court can, even when sitting at chambers, award a writ of habeas corpus that shall run to any part of the State, although there is an officer in the county where the imprisonment exists who could issue the writ (People ex rel. Bentley v. Hanna, 3 How. Pr., 39; People ex rel. Trainer v. Cooper, 8 Id., 288; People v. Folmsbee, 60 Barb., 480-487).
- 4. Another point is made on § 5 of the habeas corpus act (2 R. S., 560, § 5, same stat., 3 Id., 5 ed., 877). It provides that whenever any person shall be committed on

any criminal charge, and a habeas corpus to testify be issued, "he shall be remanded after having testified." I have doubted whether this provision of the statute is not mandatory on the court or judge, in habeas corpus proceedings. But further consideration has convinced me that the section was intended to apply to the court or officer before whom the prisoner is brought to testify, and that it does not prohibit an inquiry on habeas corpus as to the lawful imprisonment of the petitioner. To give the section so extended a construction as to deny an inquiry on habeas corpus into an alleged unlawful detention, would virtually nullify various provisions of the habeas corpus act, especially section 48 (2 Rev. Stat., 569, § 48; same stat., 3 Id., 5 ed., 889, § 64.) That section provides that the party brought before the court or officer, on the return to a habeas corpus, may deny any of the material facts set forth in the return, or allege any fact, to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge, and thereupon such court or officer shall proceed in a summary way to hear the proofs and allegations; and to dispose of such party as the justice of the case may require. Effect cannot be given to this section if it be held that the section on page 877 (§ 5) has any other intention than to prescribe to the court before whom a prisoner is brought to testify, a direction to remand him. I think the section was not intended to sweep away the positive provisions of the habeas corpus act. Habeas corpus is a great bulwark of liberty, and the operation of the statutes which give it power should not be restrained by doubtful and unnecessary construction.

Another question is raised on section 43 of the habeas corpus act (2 Rev. Stat., 568, § 43; same statute, 3 Rev. Stat., 5 ed., 838, § 58.) It provides that if it appear that the party has been legally committed for any criminal offense, if he appear to be guilty of the offense, although

the commitment be irregular, the court or officer shall remand him. This question touches the merits. Perhaps it would be an answer to the point raised on this section that the petitioner here was not committed for any criminal offense, but was committed for an alleged contempt. But independent of that answer, does it appear that "the party has been legally committed?" It was decided in Hackley's case, 21 How. Pr., 103, that if a party be detained in custody for any contempt, it must be plainly charged in the commitment, by some court having authority to commit for the contempt charged. and that "there must be sufficient on the face of the commitment to enable the court to see that the commitment does charge a contempt, and that the contempt charged was one for which the committing court or body had authority to commit." The court had in this matter authority to commit for "a term not exceeding thirty days." It had no jurisdiction to order an unlawful commitment. Suppose the court had ordered the petitioner to be confined in a prison for thirty years. Would it be contended that relief could not be had on habeas corpus from such an unlawful commitment?

There is no difference in principle between the case supposed and the case under consideration. A commitment for an indefinite time is not authorized by law, and the court has no jurisdiction to make it. In People v. Hicks, 15 Barb., 153, it was held by the general term of this district that a commitment for contempt could not be discharged, if it appeared that the court or officer committing had power to require the act to be done, and authority to enforce the decision. It comes back to the question of power. There are cases where, on habeas corpus, the inquiry into the practice or legality of the order or judgment directing imprisonment cannot be made. Thus, where the legality of the order can be tested on an appeal, there an appeal must be the remedy But the decisions which affect such

cases are not applicable to this case, for the order of commitment is not an appealable order.

It was also held by the court of appeals in the Hackley case (24 N. Y., 74; affirming 12 Abb. Pr., 150), that the rule referred to, respecting the inability of the court on habeas corpus to examine the cause of commitment, has its qualification; and that the court or officer on habeas corpus may inquire "whether the conduct charged as constituting the contempt" was such that delinquency or misbehavior can be predicated The doctrine of the court of appeals in that case is to the effect that an adjudication of the court in which the alleged contempt occurred cannot establish as a contempt that which the law entitles a party to do. It is equally clear, on principle, that an adjudication of the court in which an alleged contempt has occurred cannot prescribe an unlawful punishment for the contempt. It is not intended to deny that the court of oyer and terminer in Kings county had authority to inquire into the alleged contempt. The commitment cannot be impeached for that cause. On habeas corpus the court is deprived by statute of any power "to inquire into the justice or propriety of any commitment for any contempt made by any court, officer or body, according to law, and charged in such commitment" (2 Rev. Stat., 568, § 42; same statute, 3 Id., 5 ed., 888, § 57). The essential qualification of a valid commitment for contempt is that it be "according to law." The justice or propriety of the commitment cannot be inquired into if it be "according to law." There is meaning in those words of the statute. This will appear on perusal of the entire section with the correlative sections of the habeas corpus act. The former part of section 57 [42] provides that no court or officer on habeas corpus shall have power to inquire into the legality or justice of any process, judgment, decree or execution specified in the preceding section 22. Turn-

ing to that section we find that the "process" referred to is process of the courts and judges of the United States, in cases where, by law, they have exclusive jurisdiction; and the judgments and decrees referred to are final judgments and decrees. The section adds "but no order of commitment for any alleged contempt . . . shall be deemed a judgment within the meaning of this section."

Appeals are the proper remedy for illegal judgments, and therefore they may not be inquired into on habeas corpus. The language of the statute is different when a commitment for a contempt is mentioned. There the only limitation is against an inquiry into the justice or propriety of any commitment for a contempt made "according to law." If the commitment be not according to law, its "legality" may and should be inquired into.

The office of the writ of habeas corpus is to vindicate the right of personal liberty. It is a high prerogative writ, and whenever demanded on a proper petition must be issued, under severe penalty for refusal, imposed on the officer to whom the application is made. It lies in all cases of imprisonment, commitment, detention, confinement, or restraint, for whatever cause or under whatever pretense, except in the few specified instances where the statute forbids its use (2 Rev. Stat., 563, § 22; same statute, 3 Id., 5 ed., 883, § 36). The duty in all cases is to grant release where the imprisonment, detention or restraint is illegal. As was said by the court in Watson's Case (5 Lans., 466; affirming 3 Id., 408): "If the magistrate who issues the process to imprison had not the right to issue such process, the imprisonment is illegal." The same remark is applicable to a court. There is a wide difference between an informal commitment and an illegal commitment. The former, if it be one which a court could make for a contempt, plainly charged, is suffi-

cient, though in some form or part it be defective; for example, where it is not directed to any officer. But the latter, which on its face is shown to be illegal, is insufficient; for example, where it is directed by a civil court to a military officer, or enjoins a perpetual or indefinite imprisonment. It was held in the People ex rel. Mitchell v. Sheriff of New York (29 Barb., 622; S. C., 7 Abb. Pr., 96), that upon habeas corpus to inquire into the detention of a person committed for contempt, two questions can be examined: first, the jurisdiction of the tribunal by which the party was committed; and second, the form of commitment. An examination of the form of the commitment in this case under which the petitioner was restrained when the writ issued. shows that it was an illegal commitment, which no court had the power to issue. The statute (2 Rev. Stat., 278, § 11; same statute, 3 Id., 5 ed., 470, § 9), limits the period of imprisonment for contempt to thirty days, and is higher than the court which commits the petitioner for an unlimited period. Of course I refer to the commitment under which the petitioner was imprisoned in Kings county, and upon which he was afterward detained in New York county. This was the sheriff's only warrant for such detention when the habeas corpus was issued and served. The commitment states that the court had adjudged the petitioner guilty of a criminal contempt. The proof shows conclusively that the subsequent paper was not delivered to the sheriff until after the hearing on the habeas corpus case had commenced. Nor was it according to the order of the court. I cannot regard this ex post facto paper as of any validity in this case, for two sufficient reasons. It is proved that the relator was not imprisoned or detained under it; and a man cannot be first imprisoned and afterward adjudged in contempt. The judgment must precede the imprisonment. It appears from the evidence of the district-attorney that the

"Exhibit B" was not signed by the side justices until October 23, whereas the imprisonment took place on October 22, and the sheriff of Kings county held him in custody under "Exhibit A." which is in my opinion an illegal commitment. The second commitment was not executed until the 23rd, and could not legalize an existing imprisonment.

The result of these remarks is that the petitioner must be discharged.

CARRERE against SPOFFORD

New York Superior Court; Special Term, November, 1873.

PARTIES. — SURVIVORSHIP. — SUPPLEMENTAL COM-

If a sole surviving partner, against whom an action to recover on a partnership liability is pending, dies, his executors are the proper parties defendant to be brought in in his place.

Actions growing out of the contracts of a firm must, upon the death of a partner, be brought by or against the surviving members alone.

The joint debt may, by reason of the death of a partner, be treated as if originally a separate debt of the surviving partner.

Under our statute, upon the death of the surviving trustee of an express trust, such trust estate does not descend to his heirs nor pass to his personal representatives; but, if unexecuted, it vests in the supreme court.

Demurrer to supplemental complaint.

This action was originally brought by Maynard E.

Carrere, the plaintiff, against Paul Spofford, the survivor of the late firm of Spofford & Tileston, to secure an accounting from the defendant, as such surviving partner, of moneys which the firm had received as agents of certain steamships in which plaintiff was a part owner, and to which he claimed to be entitled.

During the pendency of the action, Paul Spofford, the surviving partner, died, leaving the defendants, Paul N. Spofford and others, his executors, into whose hands, as such executors, as is alleged in the supplemental complaint, assets have come.

The executors were now brought in as sole defendants, in the place of Paul Spofford, deceased, by way

of supplemental complaint.

To the supplemental complaint the defendants demurred, stating as their sole ground of demurrer that the supplemental complaint does not state facts sufficient to constitute a cause of action.

J. L. Cadwalader, for the plaintiff.

Edgar S. Van Winkle, for the defendant.

Van Vorst, J.—Upon the death of a partner all that passes to his representatives is his proportion of the assets after they have all been converted into money, and all the debts and liabilities have been paid. The surviving partner has exclusive right in virtue of his title, and upon him is cast the duty, of closing up the partnership affairs. All actions brought in respect of any contract entered into by or on behalf of the firm before the death of a partner must be brought by or against the surviving members of the firm alone. The representatives of the deceased cannot sue or be sued in respect of such contract.

Parsons, in his treatise on the Law of Partnership, section 447, says: "The executors or administrators of

the last survivor sue alone without joining the representatives of the first or any later deceased;" and Lindley, in his work on the same subject (3 ed., vol. 1., p. 505), says the legal representative of the surviving partner is the proper person to sue and be sued at law in respect of the engagements of the firm.

No one of the cases cited by these learned writers is an illustration of the rule as laid down by them in this particular regard as to the person to sue or be sued upon partnership obligations on the happening of the ultimate contingencies above contemplated. And yet such rule would seem to be a corollary from principles long settled with regard to the nature of the partnership and the right and interest of the partner, and the vesting of the title to the property on the death of a partner.

Not only the remedies, but the rights and liabilities of the partnership, vest in and are imposed upon the surviving partner. In Davis n. Church, 1 W & S., 240, it is said "the action of the surviving partner is his own." In Yale v. Eames, 1 Metc., 486, it is said, "if one partner die the whole legal title vests by survivorship in the other."

And in like manner as to liabilities. Each partner is liable to pay the whole debt, and contribution lies entirely among themselves.

In Rice v. Shute, 2 Burr., 2613, Lord Mansfield said, "All contracts with partners are joint and several; every partner is liable to pay the whole debt;" and in Richards v. Heather, 1 B. & Ald. 29, it was held that a plaintiff in an action charging the defendant in his own right, might recover a demand due from the defendant individually and another due from him as surviving partner. The joint debt may, by reason of the death of a partner, be treated as if originally a separate debt of the surviving partner.

I have considered the analogy drawn by the learned

counsel for the defendants from the condition of a trust estate upon the death of the surviving trustee of an express trust. Under our statute such trust estate does not descend to the heirs, nor does it pass to the personal representatives of the survivor, but if the trust be unexecuted it shall vest in the supreme court. A surviving partner, it is true, is a trustee for all conconcerned in the copartnership, for the representatives of the deceased and the creditors of the firm. But it is a trust to wind up the affairs with fidelity and without unnecessary delay. Still, he is more than trustee; he is in his own right principally interested in and possesses in himself the title to the property and assets as surviving owner, and it is because of such legal right in himself that he becomes a trustee for the creditors and legal representative of his deceased partner.

[The learned judge here recapitulated the facts of

the present case, fully stated above.

In view of the principles above recognized, the defendants, into whose hands the assets and property of the surviving partner have come, and that lawfully, are solely liable to account in this action for this copartnership liability and obligation to the plaintiffs.

The demurrer should be overruled, with liberty to

defendants to answer on the usual terms.

Stage Horse Cases.

THE STAGE HORSE CASES

BROADWAY, &c., STAGE COMPANY against THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS.

New York Common Pleas; Special Term, January, 1873.

CHRISTIE against BERGH.

New York Marine Court; June, 1873.

Injunction.—Trespass.—Franchises.—Contempt.
—False Imprisonment and Malicious Prosecution.—Officer.—Arrest.

An injunction lies to restrain the persistent commission of trespasses even of a mere personal nature, where they affect a corporate franchise.

Under Laws of 1866, ch. 682, and Laws of 1867, ch. 375, relating to the powers of agents of the American Society for the Prevention of Cruelty to Animals,—an arrest without warrant can only be made where the offense is committed in the presence of a duly designated officer or agent of the society, who makes the arrest.

In respect to offenses consisting in cruelty to animals, the act of 1867 is to be deemed declaratory of the common law; and driving a horse, while ignorant that it is sick or sore, is not, per se, tormenting

or torturing it, within the meaning of the act.

The court, in an action brought by incorporated stage companies engaged in the carriage of passengers, will not enjoin the society from arresting the drivers or servants of the companies, but may enjoin them from stopping the vehicles, except for the purpose of an arrest in a clear case of violation of the law, and from taking custody of the horses or vehicles, or interfering with the passengers.

Such an injunction having been issued, the stopping of a stage for the purpose of arresting the driver in a case in which the horse was actually lame at the time,—Held, not a violation of the injunction,

Stage Horse Cases.

although upon the subsequent trial of the driver, on a charge of cruelty, he was acquitted.

Where the officers of the society have, on conceded facts, clear evidence on which to base a sound judgment that an offense is committed, they should not be punished as for contempt in violating such injunction, but the other party must be left to an action for damages.

The agents of the American Society for the Prevention of Cruelty to Animals, duly designated by the sheriff, may arrest, without warrant, a person found by them in the very act of over-driving a horse which appeared at the time to be incapable of doing the work, and was being over-driven in such manner as to involve cruelty.

An action for false imprisonment, as distinguished from an action for malicious prosecution, cannot be maintained, if the power to make the arrest existed. Where a power to arrest is exercised without probable cause, and with malice, the remedy is an action for malicious prosecution.

The Broadway and East Side Stage Company brought an action against the American Society for the Prevention of Cruelty to Animals, and Charles Johnson and others, John Marshall and others, and S. W. Andrews and others respectively, brought similar actions,—to enjoin interference with their lines of stages in the city of New York.

I. Motion for an injunction.

The complaint and affidavits of the plaintiff in the action first mentioned, stated: that the plaintiff is a corporation created under the laws of this State and has a right of way and franchise to run a line of stages through certain streets of the city of New York and pays the city an annual license fee; that it has a large capital invested in its business and its running expenses are large; that it has men stationed along its route to see that no negligence of, or cruelty to, its horses is practiced by any of its drivers; that it is attentive to the wants and necessities of its horses,

which are well fed, kept in good condition and sound and able to perform their work; that it keeps horses in reserve to replace those disabled, and that no horse is allowed to work more than five hours out of the twenty-four, and that no horse is allowed to leave the stables that is not perfectly able to work. That the defendant, the American Society for the Prevention of Cruelty to Animals, is incorporated by the legislature of this State and Mr. Henry Bergh is and has been for a long time the president of said society; that Mr. Bergh interferes with plaintiff's business by stopping its horses, arresting the drivers, causing the loss of trips, compelling the drivers to pay back passenger fares, and by sending the horses to strange stables or leaving them exposed in the street for hours without food, water or shelter; that each arrest causes loss to the company, suffering to the driver and injury to the reputation of the line, and that against these oppressive acts of Mr. Bergh and his employees the plaintiff cannot protect its rights or interests except by an injunction to secure it in the enjoyment of its chartered privileges. That the drivers of the stages do not select the horses they drive, and the superintendent of the stables is required to see that no horse is turned out to work unless it is in good condition and able to perform its work; that the said superintendent never allows a horse to make a trip unless he is known to be in a condition to do so without injury, trouble, or suffering, and that the plaintiff takes every precaution to protect its horses from injury, cruelty or neglect; that drivers of plaintiff's horses have been arrested by Mr. Bergh and by his orders, without warrant, and locked up from twelve to twenty-four hours, yet, upon investigation before the special sessions, have been discharged, there being no cause of complaint against them; that the agents employed by Mr. Bergh or the society to determine if the horses are fit to work and to arrest the

drivers, are incompetent to judge whether a horse is sound or not; that Mr. Bergh threatens to cause the plaintiff all the expense and trouble he can and to do all he could to injury it, and he has carried out his threat by stopping horses without cause, arresting drivers and harassing the company without any just cause; that in six certain cases plaintiff's drivers were arrested by the agents of the defendant and locked up from twelve to twenty-four hours, but were afterwards discharged either upon being proved innocent on trial or from failure of the prosecutors to appear; that such arrests were made without warrant, and upon the order of Mr. Bergh; that the latter admitted in court he had never secured a conviction of plaintiff's drivers, yet continues to harass the drivers, stop the horses, interfere with plaintiff's business and takes every means to annoy, injure and interrupt plaintiff's business and cause it loss; that plaintiff has suffered and does suffer great injury therefrom; and if these acts are continued great and irreparable pecuniary injury will result to plaintiff, and by such acts a large amount of travel has been diverted from plaintiff's line; and that all such acts on the part of Mr. Bergh are malicious and committed from ill-will and vindictiveness towards plaintiff.

The complaint and affidavits on the part of the plaintiffs in the action brought by Jesse A. Marshall and others, proprietors of the Broadway and Fourth-avenue line and the Madison-avenue line of stages, recited substantially the same facts and grounds of complaint, and show in addition that on some fourteen occasions their horses were stopped by defendant's agents, causing the loss of trips, yet that such horses were afterwards found to be able to work and resumed their trips without any suffering to themselves; that the defendant's agents stop plaintiffs' stages, examine their horses, and endeavor to find excuses for arresting the drivers; and that in fifteen or twenty instances Mr. Bergh has

stopped their stages, causing the loss of trips, and after examining the horses finally let them go, not being able to find any ailment.

The complaint and affidavits in the action wherein Charles Johnson and others, proprietors of the Broadway and Twenty-third-street line of stages, are plaintiffs, recited substantially the same grounds for the relief demanded.

The moving papers in the action of Samuel W. Andrews and others, proprietors of the Fifth-avenue line of stages, contained, in addition to affidavits of the same facts substantially set forth above, an affidavit of Archibald H. Campbell, who was for three years an associate of Mr. Bergh in the Society for the Prevention of Cruelty to Animals, and who made arrests by order of Mr. Bergh, stating certain conversations had between Mr. Bergh and himself, intended to show that the former was actuated by vindictive feelings against the drivers, and not by pity for the horses; also an affidavit by H. C. Palmer, superintendent of the plaintiffs' stables, to the effect that Mr. Bergh having in one night stopped several horses, saw them next morning at the stables and pronounced them fit to work, also other affidavits as to instances where drivers were acquitted after arrest, and instances of great suffering caused to horses where the driver was arrested.

The answer of the defendant, the Society for the Prevention of Cruelty to Animals, in all the actions was an admission of its own incorporation and a general denial. The affidavits of T. W. Hartfield, general superintendent of the society, and of Henry Bergh, president, were read on the motion, and were substantially alike in all the actions. The affidavit of Hartfield recited the charges of driving sick and lame horses, made in the cases of drivers arrested as stated in plaintiffs' papers, and stated that his information is derived from the record of such cases kept by the

society, in which the reports of the agents of the society making all arrests are entered by the deponent; the affidavit also stated that the persons making the arrests were authorized to do so by designation by the sheriff as provided by law (chap. 375, Laws of 1867, § 8), and are familiar with the diseases, condition, and sufferings of horses propelling vehicles for the conveyance of passengers in this city; that the persons alleged by the plaintiffs to be selected for the purpose of supervising the drivers and preventing cruelty to the horses are not appointed for such purpose, but to spy upon the conduct of the drivers, to ascertain if they loiter or appropriate fares, and to stimulate them to make as many trips as possible; that such persons have endeavored to interfere with the arrest of drivers by the defendants' agents for violating the acts for the prevention of cruelty to animals, and have endeavored to screen the drivers and intimidate the agents of the society; that the condition of the horses driven to vehicles of the plaintiffs is such as to render it necessary for the agents of defendants to stop the vehicle with a view to arrest the driver; and, where drivers have pleaded ignorance, admitted that the horse was not in a physical condition to proceed further, and consented to withdraw the horse and send it to the stable. the driver has not been arrested; that in no case have the agents of the society compelled the drivers to return fares; that the plaintiffs never remove a horse from a stage unless it is absolutely unable to proceed, and never because of lameness, raw, bleeding or running sores, or ordinary physical suffering, until the stage is stopped by an agent of the defendant, and in many cases the driver has thanked the agent; and that in cases of stoppage the agent sends word by a passing driver to the stables of the cause of stoppage, and what is necessary for the plaintiffs to do in the premises. The affidavit of Mr. Bergh stated that he originated

the Society for the Prevention of Cruelty to Animals, and the protection of the brute creation; that in the discharge of his duties he has been instigated by no feeling of malice, ill-will, or unkindness towards the plaintiffs, and that he has never arrested any one through feelings of malice or ill will; that his services are voluntary and he has never derived any pecuniary benefit from the prosecution of offenders under the act aforesaid; that for the past six years he has had full opportunities to observe the physical condition of the horses attached to plaintiffs' stages, and he swears to the particular matters respecting them set forth in Hartfield's affidavit: that when drivers are arrested their horses are properly cared for, and are consigned to the care of the police pursuant to law, and where their condition was such that they were unable to remain upon the street, they have been placed in a proper stable and sheltered, fed and kept; that no arrests without warrant have been made except of offenders found violating the provisions of the acts aforesaid; that he has had no intention to injure the plaintiffs, and has caused them no damage in the prosecution of their business or caused them any loss, and that their loss has been the result of their own willful violation of the law: that he is duly designated by the sheriff to make arrests; that wherever he has abandoned a prosecution, and wherever a driver has been discharged at the request of an agent of the society, it has been where the prisoner promised that he would not again violate the law, and not where any doubt exists that the offense has been committed; that the affidavit of A. H. Campbell and others, as to conversations with and statements made by him (Bergh), are wholly false and are also false in all other particulars except that said Campbell was at one time an officer of the defendants.

James M. Smith and C. F. Wetmore, for the mo-

tion.—I. This action is sustainable as a bill to prevent a trespass, and to restrain a corporation from an abuse of corporate power (Code, § 219; Willard Eq. Jur., 382; 1 Hilliard on Inj., 280).

II. The course pursued by the agents of the society is one calculated to injure irreparably the franchise of the plaintiffs (2 Story Eq. Jur., §§ 926, 959; Livingston v. Livingston, 6 Johns. Ch., 497; Kerr on Inj., 295).

III. The arrests complained of are illegal, because

made without warrant previously issued.

Elbridge T. Gerry (with whom was Ambrose Monell), for the defendant, in opposition.—I. This action is an attempt to paralyze the functions of a corporation which was created by the legislature of this State for the express purpose of enforcing certain penal statutes for the protection of the brute creation (1 Laws of 1866, ch. 469, § 7; 1 Laws of 1867, ch. 375, § 8; People v. Tinsdale, 10 Abb. Pr. N. S., 376).

II. The act creating this corporation was designed, among other things, to remedy a defect supposed to exist at common law, relative to arrests by sheriffs and constables for misdemeanors without warrant (Butolph v. Blust, 41 How. Pr., 481, 490; S. C., 5 Lans., 84; Willis v. Warren, 17 How. Pr., 101, per Brady, J.).

III. The officers of this Society are quasi constables, charged with the enforcement of certain public laws; and a court of equity should not interfere to restrain them in the discharge of their duties in good faith (Sterman v. Kennedy, 15 Abb. Pr., 201; Moore v. Comrs. of Pilots, 32 How. Pr., 184; Gilbert v. Mickle, 4 Sandf. Ch., 357, 362; Prendorill v. Kennedy, 34 How. Pr., 416; Willis v. Warren, 17 Id., 100; 2 Story Eq. Jur., § 893; Roback v. Taylor, 4 Int. Rev. Rec., 170).

IV. The duty of the Society is to prevent cruelty, as well as to secure the punishment of those guilty of

it. Hence, stoppage of vehicles by its officers is lawful, when the object is to prevent a continuance of the offense; and that effected, they are not necessarily bound to proceed further and to arrest when the cruelty is discontinued (Queen v. Firth, 1 Law Rep. Crown Cas. Res., 172).

J. F. Daly, J.—The acts of the legislature upon which the defendants rely are, Laws of 1866, ch. 682, and Laws of 1867, ch. 375. By the first act it is made a misdemeanor for any person by act or neglect to "maliciously kill, maim, wound, injure, torture or cruelly beat any horse, mule, ox, cattle, sheep or other animal." By the last act it is made a misdemeanor to "overdrive, overload, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat or needlessly mutilate or kill, or cause or procure to be overdriven, overloaded, tortured, tormented or deprived of necessary sustenance, or to be unnecessarily or cruelly beaten, or needlessly mutilated or killed as aforesaid any living creature." And by section 8 of the last mentioned act it is provided that "Any agent of the American Society for the Prevention of Cruelty to Animals, upon being designated thereto by the sheriff of any county in this State may, within such county, make arrests and bring before any court or magistrate thereof, having jurisdiction, offenders found violating the provisions of this act."

The relief demanded by the plaintiff is an order of this court restraining the defendants and its agents and employees from interfering with the plaintiff's business in any way or manner whatever, or with its agents, employees, drivers, or superintendents of its stables, acting on behalf of plaintiffs, or engaged in their business; and from arresting, detaining or interfering with any of them; and from interfering in any manner with the plaintiffs' horses, property, or appointments connected

with said lines of stages, and for such other and further relief as the court may deem proper; and the plaintiffs further ask judgment for damages.

So far as the jurisdiction of a court of equity to entertain an action of this nature is concerned, the objections of the defendants are not well taken. While bills have been filed usually to restrain the commission of trespasses against real property only, and precedents for such a remedy against mere personal trespasses are more difficult to find, yet where the trespasses, oft repeated and damaging, are committed against a franchise created and granted by the sovereign power, a court of equity will not hesitate to enjoin them. The reason of this is that the public at large have an interest in the protection of such rights and privileges as well as the parties particularly interested. The establishment of routes and conveniences for the carrying of passengers is highly necessary to the community, and any improper interference therewith will always be prevented by injunction. All invasions of franchises are the subjects of relief in equity (4 Johns. Ch., 150; Id., 48; Story Eq. Jur., 2, 108). No interference with the business and franchises of the plaintiffs, however, can be improper which results from the arrests contemplated by the aforesaid act of 1867, when made by the persons and in the cases prescribed by that act; and no injunction will issue to restrain the defendants or their agents from performing the duties they are required by that act to perform. The designation by the sheriff, provided for in section 8 of the act, constitutes an agent of the society an officer of the law, with the power of immediate arrest, in certain cases, without warrant, of offenders against the provisions of section 1 of that act. The enactment by the legislature is sufficient to confer this power, even if such agents did not become by the designation aforesaid deputies of the sheriff to that extent, he being ex officio a conservator

of the peace (10 Johns., 85). The powers thus conferred on the agents of the defendant are those of a constable at common law or of a police officer, so far as offenses against the said act are concerned. But such offenses are misdemeanors only, and the arrest cannot be made without warrant except where the offense is committed in the presence of the officer (2 Cush., 246, 615).

The legislature which creates the franchise enjoyed by the plaintiffs and the public, has the right to impose certain general restrictions in the exercise of its duty to preserve the peace or to institute police regulations within constitutional limits. It had power to pass the act to punish the overloading or overdriving of horses, the tormenting or torturing them, or the cruelly beating, mutilating or killing of them needlessly; in fact the whole act above quoted was within the scope of the legislative power, and it is no interference with the rights of plaintiffs to compel an observance of that act in the management of their franchises, and no inconvenience or loss arising from a willful violation of that act can be urged as a ground for restraining arrests by defendant's agents for such violation (7 Wall. U. S., 487; 8 Pet. C. Ct., 390; 15 Abb. Pr., 201; 32 How. Pr., 184; 34 Id., 416; 10 Abb. Pr. N. S., 376). The only ground for injunction must be that interference with the plaintiff's franchises is attempted by defendants' agents in cases not within the provisions of the act, or in excess or abuse of the authority conferred by it. I have already said that the arrest without warrant can only be made where the offense is committed in presence of the designated officer who makes the arrest. This is not only the rule at common law but is the true interpretation of the statute itself, which provides for the arrest of persons "found violating the provisions of the act." In a case where similar language is found in an enactment as to the arrest of persons "found violating" the provisions of a municipal ordinance, the

general term of the supreme court of this State has held an arrest without warrant to be proper (Butolph v. Blust, 41 *How. Pr.*, 481).

What then are the offenses committed in the presence of the officer which justify the arrest without warrant? It appears from the affidavit of Hartfield, the general superintendent of the Society for the Prevention of Cruelty to Animals, that the complaints upon which the drivers of the plaintiffs' stages were so arrested without warrant, were for driving horses which were lame, or suffering from disease: thus in one case a horse so driven had a large fissure in the anterior portion of the near hind hoof, another had a raw sore on each shoulder under the collar, another was badly foundered and sprung, another was so sick that he staggered and fell, another had a raw sore on the right breast, and a long cut or gash on the front of the fore leg, and a raw wound on the fetlock joint, another was lame in the left fore leg; all of these were complained of as offenses against the statute prohibiting the "torturing or tormenting" of horses. No complaint seems to have been made against the plaintiffs for the overdriving, overloading, beating, mutilating, killing or depriving of necessary sustenance, of the horses drawing their vehicles. The theory of the defendant is that the driving of horses afflicted by disease or wounds in the manner described is a tormenting or torturing of the beast within the letter as well as the spirit of the statute, without regard to the intention or knowledge of the driver.

I am inclined to agree with the counsel for the defendants that the act of 1867 was passed to remedy a supposed defect in the common law,—i. e., that an arrest without warrant could not be made in the case of a misdemeanor committed in the presence of the officer unless it tended to a breach of the peace. The power of constables to arrest without warrant in cases of mis-

demeanor appears to have been confined to acts committed in their presence which tended to a breach of the peace, and to affrays (1 Bish. Crim. Pro., § 460, and cases cited in notes). But in this State it is held that constables may arrest without warrant for any misdemeanor committed in their presence (17 How. Pr., 101). The courts of this State, as far back as 1822, and the courts of other States have decided that wanton cruelty to an animal,—e. q., excessive beating of his horse by a cartman, -or any deliberate cruelty to an animal, is a misdemeanor at common law (1 Wheel, Cr. Cas., 111; 3 City Hall Rec., 191; 1 Aiken [Vt.], 26; 7 Law Rep. N. S., 89, 90); so that even without the act of 1867, such arrests as are contemplated by it might be made by the proper officers without warrant. The act was designed evidently for the purpose: 1, of clothing the agents of the society with power to make such arrests; and, 2, to place beyond a doubt the criminality of the acts of cruelty to animals, as well as to more particularly define in what such cruelty consisted. My opinion is that as to the offenses themselves the act of 1867 was declaratory only of the common law.

The act in other words created in these respects no new offenses, but provided for the punishment of such as were indictable at common law, each of such acts of cruelty being malum in se. To constitute at common law the offense of cruelty, deliberation was necessary, as evidencing the wicked intent to inflict injury upon the animal. This was held in the case of People v. Ross, above cited (3 City Hall Rec., 191), where a carman, intending to beat his horse for refusing to draw its load, struck it a single blow upon the neck, which killed it. He was acquitted on the ground that the evidence showed no deliberate intention to kill the animal, but only to chastise it. Under this act of 1867, certain of the offenses designated are by their commis

sion alone evidence of willful intent to commit the misdemeanor—such as overloading or overdriving (10 Abb. Pr. N. S., 377), cruelly beating or needlessly mutilat ing or killing or depriving of necessary sustenance. any dumb animal (1 Aiken [Vt.], 226), and such also as tormenting or torturing such animal by cruel or unusual punishments or wanton injury done from wicked motives. But it is clear that the mere fact of driving a sick, sore, lame, or disabled horse, is not, per se, the tormenting or torturing intended by the act. driving of such a horse directly to its stable is not an offense, nor driving it for exercise, nor driving it carefully in a manner proportioned to its condition, where it has become disabled. lame, or sick, on the road. And whether a horse suffering from certain sores or disorders is injured or suffers torment or torture by being driven is in many cases such a question for the determination of medical experts as renders it exceedingly doubtful as a case of patent torturing or tormenting within the act.

Here, then, in the case of drivers arrested for driving diseased horses, arises the question as to how far such drivers are guilty of any offense if ignorant of the condition of the horses or inexpert in detecting those signs, familiar to veterinary surgeons, of suffering on the part of the animal. Upon indictment for offenses malum in se ignorance or mistake of fact is an excuse which is available to the prisoner as a defense (3 Green, Ev., § 21). As appears from the proofs, the drivers are not allowed to select the horses which they are to drive. nor can I see how they are to be bound to the same knowledge of the horse which a surgeon would possess, nor how they can be arraigned for tormenting or torturing the horse if they are driving it pursuant to their orders and are wholly ignorant of its physical condi-There is a vast difference between such an act in which their is neither motive, malice, nor wantonness

on the part of the driver, and those acts of cruelty which the legislature intended to punish, which evidence a savage and unfeeling heart and a willful disregard to the sufferings of the helpless brute. I am not surprised, with these difficulties surrounding this particular class of offenses, that "no convictions of plaintiffs' drivers have ever been had" as the plaintiffs allege and as is not denied, although so many arrests have been made; and I have given this consideration to the point because it appears from the papers before me that whatever offenses against the law have been committed, the only persons who have invariably suffered therefor are the drivers. They have been arrested and locked up from twelve to twenty-four hours, when the actual offense, if any, was committed by the parties who knowingly caused them to drive horses unfit for the work, and who might as easily have been punished under the provisions of the act.

But while it may be proper to discuss what constitutes an offense within the act of 1867, and even while it may appear that arrests have been made without cause, it is not clear at all that against the proceedings of defendants' agents in the future, so far as the authority to arrest is concerned, any injunction could be issued which would not wholly destroy the objects of the statute and the purpose of the Society for the Prevention of Cruelty to Animals. It has been shown that the agents of that society have power to arrest, without warrant, offenders against the provisions of the act where the offense is committed in the presence of the person making the arrest. I can make no order restraining the arrests generally; because a proper cause for making them may arise. The plaintiffs urge that inasmuch, as they allege, and the defendants do not deny, that their horses always leave the plaintiffs' stables in good condition, and that all the plaintiffs' horses are now sound and able and fit to work, the

defendants should be enjoined from any arrests of the driver from this time. It is an answer to that application to say, that in the nature of things there is no certainty that such a state of facts will continue, for it is not incapable of change from day to day; and so far as the condition of the horses, their proper treatment, and relative ability to work is concerned, they are all questions dependent upon professional opinions and are subjects upon which the greatest difference of opinion may exist. I have indicated what I deem to be the principles for guidance in determining whether offenses are committed against the statute or not, as matter involved in the construction of the statute. The enforcement of the law is largely committed to the defendants, and their serviceable work cannot be stopped. The injunction prayed for as to the arrests of the drivers or employees of the plaintiffs must therefore be denied.

As to the other branch of the relief asked, viz: an order restraining the defendants from interfering with the property of plaintiffs, an order to that effect should be granted. No authority is given to defendant or its agents to stop the stages of the plaintiffs for the purpose of examining the horses to discover in what condition they are, or whether any offense is being committed in driving them, nor for any purpose except to arrest the drivers where it is perfectly clear and plain that he is guilty of a patent violation of the law. Neither have defendants or its agents any authority to take charge of the horses or vehicles in any case, or to send them to the stables, or to assume any authority or control over them, or to interfere between the driver and his passengers, or to require any fares to be paid back, or to do any of the acts of a similar nature charged in plaintiffs' papers; the power of defendants' agents being wholly confined to the making of arrests, and extending no further.

An order may be settled on notice of two days by either party

II. Motion for an attachment against Henry Bergh for alleged contempt and violation of the order entered as above directed. The facts appear in the opinion following.

C. F. Wetmore, for the motion.

Elbridge T. Gerry, opposed.

J. F. Daly, J.—The contempt alleged is the violation by Mr. Bergh of the injunction order of the court made in this action January 15, 1873. By that order Mr. Bergh and the defendants were enjoined from stopping plaintiff's stages and arresting drivers, except for a plain and patent violation of section 1 of the act of 1867, chapter 375, for the prevention of cruelty to animals. On April 7, 1873, Mr. Bergh stopped a stage of plaintiff's line in Broadway and arrested the driver. One of the horses attached to the stage was lame, covered with perspiration, with a scratch or soreness on the leg. A veterinary surgeon, who was present when the arrest was made, testifies that the horse was suffering pain, and limped badly, and was not in a condition to work. On the other hand, it was shown that the horse was fit to drive the next day, and has been driven ever since. There was no dispute as to the lameness of the horse when the arrest was made. The horse was not being driven for exercise, because it was drawing the stage with passengers, in the regular course of plaintiff's Whether that work was beneficial as exercise is not a question to be determined here. It appears that, as matter of judgment of experts, the horse was suffering when the arrest was made. The stopping of

the stage was to make the arrest, there being in the sound judgment of Mr. Bergh and others, experts, ground for believing an offense to be committed under the act in question. The driver was imprisoned and tried at the special sessions, but acquitted, the judges having doubt of his guilt; and he was required to produce evidence in his defense, the prosecution making out, in the judgment of that court, a prima facie case. Whether the arrest was proper or not is not altogether the question to be considered now, the driver having his remedy in a court of law for damages, and the plaintiffs having their action of trespass. The point is, whether Mr. Bergh has been guilty of a willful violation of the order of injunction made by this court. I think the evidence on this motion shows that he has not. It must be remembered that the agents of the Society for the Prevention of Cruelty to Animals are charged by law with the execution of the provisions of the act of 1867. They cannot, therefore, be punished in this summary manner, unless the proofs show that, in a case where there is no doubt that no offense was committed, they nevertheless interfered with the plaintiffs' franchise to make the arrest. Where they have on conceded facts clear evidence on which to base a sound judgment that the offense is committed, they will not be punished as for a contempt, and the plaintiffs must be left to their legal remedy.

Dennis Christie, the driver mentioned in the last preceding case, sued Henry Bergh, in the marine court, for false imprisonment, and obtained an order of arrest against his person. Bergh moved to vacate. The facts appear in the opinion.

Elbridge T. Gerry, for the motion.

C. F. Wetmore, opposed.

SHEA, C. J.—This is a motion to vacate an order of arrest. It has been heard upon the complaint and upon affidavits read by each party in his own behalf respectively.

The decisive point of contention upon the argument of this motion relates to the legality of the power exercised by the defendant to arrest, or cause the arrest of, certain offenders charged with misdemeanors, and to do so without written warrant. This was conceded on the argument by both counsel; and it is, therefore, important, and perhaps controlling, that the scope of this action itself is limited by the contention on the part of the plaintiff that the wrong complained of was false imprisonment and not malicious prosecution. Unless there has been an unauthorized arrest the action cannot be maintained.

The objection was not suggested upon the hearing, that where the action is founded upon averments of wrong and not upon contract, the merits of the case cannot be tried upon a motion to discharge the order of arrest, but should be tried as of the issues in the action; and, undoubtedly, this must have been left unsuggested as an objection herein, because the motion really goes to the very right of action in the plaintiff, and not to the fact and circumstances of the arrest. Such cause of action is generally not to be decided by a hearing upon affidavits; yet where, as here, the form and gist of the action is conceded by each party, the fact is sufficiently presented for a court to adjudge whether the right of action, as it exists by the averments in the complaint and this concession on the hearing, can be maintained.

Before the mere forms of action were abolished by the Code of Procedure, the present would have been in form an action of trespass. Malicious prosecution would have taken the form of an action on the case. While the forms of action are abolished, still they serve

as very accurate and intelligible guides to the consideration of the strictly legal merits of such a law question as is now under advisement. A case of malicious prosecution can be maintained where, without probable cause, and with malice, the law is used wrongfully to restrain by its process the liberty of another person: the gist of such an action is the want of probable cause and the existence of malice. But false imprisonment is, where the restraint of personal liberty is utterly without warrant or prescription of law; without "due process of law," as it is most usually expressed: the gist of such an action is the unlawful taking of the person into custody. In the first "the question always turns upon this, Was the arrest bona fide? Was the act done fairly and in pursuit of an offender, or by design, malice or ill-will? . . . Many an innocent man has and may be taken up upon suspicion; but the mischief and inconvenience to the public in this point of view is comparatively nothing; it is of great consequence to the police of the country" (Lord Mansfield, in Ledwith v. Catchpole, Caldecott's Cases, 291). In the second, the power to make the arrest at all, is denied.

The single question now before me for consideration, therefore, is: Had the defendant, at the time of the arrest of plaintiff, power given to him, by competent lawful authority and in an official capacity, to place the plaintiff under such an arrest and detention?

These are the facts: The plaintiff is a driver of a public stage, and on April 7, 1873, while he was engaged in his business as driver, the defendant called a policeman to him, and, in a public street in this city, directed that officer to take the plaintiff immediately and without further or other warrant into custody; charging that the driver was then in the act of overdriving a horse which appeared at that time to be incapable of doing the work imposed, and that this

overdriving was in such a manner as to incur the offense of cruelty to the animal, and was within the act for the prevention of those offenses. The plaintiff was then taken by that officer before a committing magistrate at the Jefferson Market police court; was there, on a charge lodged by defendant himself, committed by the magistrate to answer for driving a horse attached to an omnibus, the horse then being in a completely lame condition (Laws of 1867, ch. 375, § 1).

The case was then tried at the special sessions. After many witnesses had been examined on the part of the people and of the accused, the defendant being one of the witnesses for the prosecution, the plaintiff was acquitted of the charge. By the affidavits read by the plaintiff on this motion he denies that he was guilty of any cruelty to the horse, and denies that the horse was lame or unfit for the work; and other evidence was read tending to prove the truth of these denials. The defendant justifies his own action on that occasion by several statutes of the State of New York, especially one entitled "An act better to prevent cruelty to animals," passed April 19, 1866; another, entitled "An act for the effectual prevention of cruelty to animals," passed April 12, 1867; and the duty and power conferred upon "The American Society for the Prevention of Cruelty to Animals" (Laws of 1866, ch. 469, passed April 10, 1866), its members and agents; of which society the defendant is now, and was at the time of that arrest, the president; and he insists that, in directing the officer to take the plaintiff into custody and in making the charge upon which he was subsequently tried, the defendant was acting in the performance of duty and within the limits of his official powers. The act complained of is thus confessed to have been by the direct procurement of the defendant. Had he authority by law to do this thing and in the manner in which he directed it to be done?

The rule of the common law is, beyond a doubt, that while a constable has power to arrest without warrant on the charge of a third person in cases of felony, he has no such power in cases of misdemeanor after the offense has been committed: "Suppose a constable is told that a misdemeanor has been committed he has no power to arrest. The power to apprehend on suspicion is confined to cases of felony" (MARTIN, J., in Griffin v. Coleman, 4 N. & H., 270), and this rule must be applied in accordance with the definitions of felony and misdemeanor at common law, except where and as the statute law has clearly and specifically altered that rule. This distinction is obviously founded upon the difference in the enormity of the offenses, and upon the policy that greater expedition might be necessary to secure the offender in cases of felony than in those of misdemeanor. What power, if any, has the defendant above that inherent in other private citizens to do this act complained of? The offense imputed was merely a misdemeanor; and therefore the rule of the common law, which does not permit such an arrest by constable or private person, should prevail; but that that rule has been superseded, in this very classification of misdemeanors, by positive statutes.

The authority to make such arrests has been conferred by statutes upon the members and agents of that society, and it is clear to me that the defendant, in procuring the arrest of the plaintiff at the time and in the manner stated, was doing an act within the intent of the official duty and power delegated to him. I speak now and here of the authority itself—not of its abuse.

And first, as to the public officer. I find his power to make such arrests in section 8 of the act to establish a metropolitan police district (Laws of 1857, ch. 569), whereby the members of the police force of the district are given "in every part of the State of New York, all the common law and statutory powers of constables,

except for the service of civil process;" and in the amendatory act (Laws of 1860, ch. 256), declaring in section 28 that the members of the police force "shall possess in every part of the State all the common law and statutory powers of constables, except for the service of civil process" (see also Laws of 1870, ch. 137, §§ 56, 57, as amended by Laws of 1870, ch. 383, § 23). Judge Woodruff, in Burns v. Erben, 40 N. Y., 463, after remarking that the appeal in that case had been taken upon a misapprehension of the construction and effect of the statutes conferring power upon the policeman, continues, "I think the power perfectly clear, and I notice that the rules and regulations of the board of police are in conformity therewith, and it is made the duty of the officer to take the arrested person immediately before the police court," &c. To be sure, the particular charge in that case was of felony, but the court were discussing the subject of arrest without warrant in its general reason and necessity.

And, second, as to the power of the defendant officially, as an agent of the society, and in like cases as that under consideration, to direct and participate in arrests for those offenses. This power is to be found in the Laws of 1867, ch. 375, § 8: "Any agent of the American Society for the Prevention of Cruelty to Animals, upon being designated thereto by the sheriff of any county in this State, may, within such county, make arrests and bring before any court or magistrate thereof having jurisdiction, offenders found violating the provisions of this act," &c. And then, in conjunction with the sections concerning the police which I have referred to, is to be read that which, in a compendious manuer, declares the relative duties of the police and the members and agents of the society in these proceedings: "The police force of the city of New York. as well as of all other places where police organiza-

tions exist, shall, as occasion may require, aid the society, its members or agents, in the enforcement of all laws which are now or may hereafter be enacted for the protection of dumb animals" (see the charter of the society, Laws of 1866, ch. 469, § 7).

These several statutes have effectively superseded the rule of the common law, and have enabled the society, directly by its members and agents, or indirectly through the aid of police, to make such arrests.

The police are directed to act "in aid" of the execution of original authority and "as occasion may require." The occasion which may require the intervention of the police force would be merely to preserve the public peace, and secure the prisoner (Derecourt v. Corbishery, 5 Ellis & B., 192; CAMPBELL, Ch. J. and EARLE, J.).

This power to arrest offenders chargeable with misdemeanor merely, and without a warrant, is not exceptional in our statutory law. It is conferred upon the officers of the metropolitan police: "The several members of the police force shall have power and authority to immediately arrest without warrant, and to take into custody, any person who shall commit or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by act of the legislature or by any ordinance of the city, town or village within which the offense is committed, threatened or 'attempted: . . . immediately upon such arrest, convey in person such offender before a magistrate of the city, village or town where the arrest is made that he may be dealt with according to law" (Laws of 1864, ch. 403, § 30); and in certain cases upon the capital police force (Laws of 1865, ch. 554, § 25); and also, upon officers of the Niagara frontier police (Laws of 1866, ch. 484, § 23); and in other instances this special power was re-enacted. But where the arrest is

made without a warrant the officer or person making the arrest must "immediately and without delay" take the prisoner before a magistrate that he may take such proof as may be offered; or, if circumstances require, hold the prisoner for further examination (Schmeider v. McLane, 4 Abb. Ct. App. Dec., 154; S. C., 3 Keyes, 568).

The power to make the arrest being clear, then the gist, the essential prerequisite, of an action for a false imprisonment, is not presentable in this case, and this cause of action cannot be maintained. The action is brought upon a denial of the power to arrest; the law itself is the sufficient answer to this denial.

There is nothing averred as to there being any unreasonable or abusive exercise of the power. An action founded on that averment could be maintained in law. The distinction between the existence of a power and the unreasonable and oppressive use of the power, should be too obvious to require me to do more than suggest it. It is elementary in its nature, and can be illustrated by a reference to many reported cases. An instance is where a constable executed a warrant in an oppressive manner, and with the avowed design to vex and harass the debtor; "for where the oppression and malice are charged as the gist of the action, and are clearly made out, the action on the case will lie. be charged with a malicious and oppressive proceeding, the proper remedy for the abuse of power is a special action on the case, in which the malice and the oppression must both be made manifest" (Rogers v. Brewster, 5 Johns., 126, and cases there cited). The principle is stated to be "that where it could be shown that one man had causelessly and maliciously exercised over another, to his damage, powers incident to his situation of superior, a special action on the case" can be maintained. Because this would not be the performance of duty, but the indulgence of maliciousness. Perhaps as pertinent as this is the case against a collector, where

the libel was dismissed, and wherein it was held that he was not a trespasser, but liable only for an abuse of authority (Van Brunt v. Schenck, 13 Johns., 415). In these and like cases the conduct of the ministerial officer was in the original taking lawful—that is, in the original capture and detention of the prisoner the act had the form of law, was within the province of power, and, in the performance, formally, of official duty. The arrest being made within the jurisdiction thus conferred, all intendment and presumption of law must be in favor of its reasonable, orderly and just administration in this instance. Public policy demands that a public agent of the law shall be presumed, until the contrary clearly and strongly appears by competent proof, to have been acting within a power which for public purposes has been conferred upon him. Yet the law will not, in its executive capacity, work unnecessarily a wrong; for, on the other hand, as we have also seen, if an individual, under color of the law, does an illegal act, or if he abuses the process of the law to make it an instrument of oppression or extortion, this is a fraud upon the law, by the commission of which liability will be incurred. Any other construction would defeat the efficacy and operation of these remedial laws, while this, which the reason and object of them force upon my acceptance, gives full effect and protection to the relative and reciprocal rights of the individual and of the public.

The suggestion of counsel at the hearing, that the decision of this question is important, in cases frequently arising now under these statutes, has led me into this exposition of the law. I have done so in the hope that the relative duties and rights of the society, "its members and agents," and those of others of the public at large, may be better understood than they seem to be, and enforced, and intelligently obeyed—that factious resistance to the law itself may be dimin-

ished, and any oppressive or vexatious administration of its provisions restrained. It is not correct to assert that the policy of this kind of legislation, especially that which has for its purpose the prevention of cruelty to brutes, is a regulation of the dominion of the private citizen over his own private property merely. It truly has its origin in the intent to save a just standard of humane feeling from being debased by pernicious effects of bad example—the human heart from being hardened by public and frequent exhibitions of cruelty to dumb creatures, committed to the care and which were created for the beneficial use of man.

Hogarth, a great instructor in the subtle influence of example upon human conduct, points the moral of, and need for, such laws, in one of his many series of eloquent sketches, wherein he delineates the demoralizing tendency of evil example by tracing, in several progressive degrees of crime, the education of the criminal from an instance of reckless, perhaps thoughtless, cruelty, done by the boy to a domestic animal in the public street, ending at length in an act of murder. And who that has read of it, as related by Roper, can forget the conduct of Sir Thomas More, himself a judge and legislator, who esteemed it among the more efficacious of his parental duties to encourage his children to take into their protection some domestic animal and foster it with provident care. Perhaps from such early practical lessons of kindness the noble filial piety and tender character of his daughter Margaret drew into her nature some of those virtues which graced her life.

It is to this persuasion and principle that we are indebted for nearly all laws against those acts of man which tend to bring before others an evil example, and which offenses are described as being against public policy or economy. Hence obscene prints and lewdness, prize fighting, whether of dogs, other brutes, or

men, are, together with public drunkenness, classed by elementary law-writers under the same classification of misdemeanors as that of cruelty to animals. These constitute, by example, "a breach and violation of the public rights and duties, owing to the whole community, considered as a community, in its social aggregate capacity," and though "of consequence, private vices or the breach of mere absolute duties, which man is bound to perform considered only as an individual. are not, cannot be, the object of any municipal law;" yet when by "their evil example or other pernicious effects they may prejudice the community, they thereby become a species of public crimes. Thus the vice of drunkenness, if committed privately, is beyond the knowledge, and, of course, beyond the reach of human tribunals; but if committed publicly, in the face of the world, its evil example makes it liable to temporal censures." In the prevention of these and like transgressions of public decency and good order the community is deeply interested; and it is safer to asseverate that this legislation relating to the prevention of cruelty to animals is to protect man himself rather than the brutes named as its beneficiaries; for even the game laws, though formed to preserve the game for their primary object, yet the ultimate object is, that the game may be increased and preserved for the benefit of man.

Having now considered this case as fully as required (perhaps as fully as desirable), I am unable to discover any legal reason upon which the order of arrest granted herein can be upheld in law; and I am, as I have already stated, of the opinion that this action, being founded on the assumption of an unauthorized imprisonment, cannot be maintained on that ground. Wherefore an order will be entered vacating that order of arrest and discharging the defendant, Mr. Henry Bergh, from custody.

Hann v. Van Voorhis.

HANN against VAN VOORHIS.

Evernage a & 37. Supreme Court, First District; Special Term, December, 1873.

INJUNCTION.—CREDITORS' ACTION.—SURPLUS OF TRUST FUND.

The surplus arising upon a trust for the benefit of a debtor created by a third person, cannot be reached by an action commenced before such surplus has actually accumulated.

An injunction does not lie to restrain the trustees from expending more than is necessary for support, &c., of the cestui que trust.

Anne R. Hann brought this action against Barker Van Voorhis, and Elias W., and Maria D. Van Voorhis, alleging that she had recovered judgment, and had issued execution which was unsatisfied, against the defendant Barker; and that the defendants Elias W. and Maria D, were executors under the will of Elias W. Van Voorhis, deceased, and were trustees for the benefit of the defendant Barker, under a trust to receive the rents and profits of the estate, and pay a part of the same to the judgment debtor semi-annually. She alleged that twenty-seven hundred dollars was payable thus, in each year, and that the sum of six hundred dollars was sufficient for the reasonable support and maintenance of the debtor; and she asked that the trustees be enjoined from paying over to the debtor during the pendency of the action, any part of his income except said sum of six hundred dollars: and that the residue be applied to the payment of the plaintiff's judgment. At the time of the commencement of the action there was no surplus in the hands of the trustees.

The plaintiff moved for an injunction pending the action.

Hann v. Van Voorhis.

Townsend & Weed, for the motion.

George W. Stevens, opposed; — Cited Leggett v. Perkins, 2 N. Y. [2 Comst.], 297; 1 Rev. Stat., 728; 2 Id., 174; Clute v. Pool, 8 Paige, 86; 1 Barb. Ch., 727; Stewart v. McMartin, 5 Barb., 443; Hallett v. Thompson, 5 Paige, 587; Campbell v. Foster, 35 N. Y., 361.

BRADY, J.—The right of the plaintiff to the relief sought upon this motion is controlled by the case of Campbell v. Foster (35 N. Y., 361), and a further discussion of the question is unnecessary. The consideration of the provisions of the revised statutes therein in reference to trusts, and of the adjudged cases, leads to the conclusion that no part of an income such as that of the defendant can be reached by a judgment creditor, unless it has accumulated beyond the wants of the cestui que trust, and is in surplus by accumulation arising from the failure of the latter to spend or appropriate, or from some other cause. It is in other words only the surplus beyond the sum necessary for the education and support of the cestui que trust, after it is ascertained that it is not wanted and has not been applied to his support as it became due, that is liable to the claims of his creditors. There is no such fund or surplus in this case.

Motion therefore denied.

Thorn v. Sheil.

THORN against SHEIL.

New York Common Pleas; Special Term, February, 1873.

FORECLOSURE SALE.—TITLE TO REAL ESTATE.—PROBATE OF WILL.

A purchaser of real estate at a judicial sale is entitled to satisfactory record title; and if it is derived under a will, he can claim that the will should have been duly admitted to probate; and the parties insisting on his taking the title must show not only that the will has been admitted to probate, but also that the surrogate admitting it had jurisdiction of the heirs at law of the testator.*

*It was held by the court of appeals in Young v. Bush, 18 Abb. Pr., 171; S. C., 28 N. Y., 667, that it is the duty of an executor, who is testamentary trustee of real property, to prove the will in the jurisdiction of the real property, and that the expense of so doing is chargeable in the settlement of his accounts of the personalty in the place of principal administration. This formerly was not necessary. Doolittle v. Lewis, 7 Johns. Ch., 45, 48. It should be noticed in this connection, that the revised statutes provide that the title of a purchaser in good faith for value from the heir, shall not be impaired by devise unless the will be proved and recorded as a will of real property.

On the whole, there seems no doubt of the propriety of the executors' proving a will which affects real property, as such, and having it effectually so recorded in all cases, as a part of his function in securing probate.

In many of the States the effect of the statutes is to make probate essential to give effect to a devise as well as to a legacy, and to make it equally conclusive in both cases; while in some of the States, as in this State, the probate is, at most, only received as presumptive evidence in the case of real property, and in some cases not admissible at all.

The changes in the law made by and since the enactment of the revised statutes have done much toward obliterating the distinctions formerly observed between the two classes of wills,

Before the revised statutes, the proof of wills of real property was made by a proceeding in the supreme court, or in the common pleas of the county, while the probate of wills of personal property

Thorn v. Sheil.

Motion to compel purchaser to complete purchase.

This motion was made after judgment and sale in

was made in the surrogate's court. Some of the distinctions between the two classes of wills which still appear to be indicated in the language of the revised statutes have been superseded by subsequent enactments. The most important of the distinctions in respect to probate were the following:

1. The rule that a foreign will may be admitted to probate, although its execution did not conform to the law of this State, was confined to wills of personal property. Compare L. 1864, c. 311.

2. The mode of compelling the attendance of witnesses, and some of the details of the procedure in the proof, as these matters were originally regulated by the revised statutes, differed according as the will was of real or personal property. Otherwise by L. 1837, c. 460, §§ 9-18.

- 3. A more important distinction concerns the function of the surrogate in taking proofs. In the case of a will of real property, if he finds that the will was well executed, and the testator competent, and not under restraint, the surrogate records the will with the proofs, and this record is made evidence simply in place of the original will; that is to say, as a record of a deed is evidence in lieu of the original. In the case of wills of personal property, on the other hand, the probate is a conclusive adjudication on the validity of its execution. In certain cases of the absence, death, &c, of all the subscribing witnesses to a will of real property, the effect of the probate is still more restricted; and the record may be received in evidence only after it has first been proved that the lands in question have been uninterruptedly held under the will for twenty years before the commencement of the action (2 Rev. Stat., 59, §18.)
- 4. The revised statutes also contemplated a separate record for the two classes of wills, and to some extent a different jurisdiction; and where a will embraced both, it needed to be twice recorded. But this requisite was dispensed with by the act of 1837.
- 5. The revised statutes introduced a provision that the probate of a will affecting personal property might be revoked on allegations filed within a year after probate, thus giving an opportunity to review the conclusive adjudication as to personal property, a privilege which the heir always had, by action, in cases of wills of real property.
- 6. The issue of letters upon a will was contemplated only in the case of wills affecting personal property. Wills of real property exclusively were not provided for in this respect. They must now be issued in any case, before the sale of the realty to pay debts.

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an action to foreclose a mortgage, brought by William K. Thorn against Lawrence Sheil and Lucy, his wife, to compel John Hanken and another, who had bid in the property at the foreclosure sale, to complete their purchase.

The fee of the premises in question, subject to the mortgage forclosed, became vested in Michael McCaffry, in May, 1864. Michael McCaffry died seized in September, 1871, at this city, unmarried, leaving a last will and testament, by which "after all his lawful debts and funeral expenses were fully paid and discharged," he devised and bequeathed to his niece Lucy Shields, wife of Lawrence Shields, all the rest, residue, and remainder of his estate, both real and personal. The testator left him surviving, among his heirs at law, his brother Phillip McCaffry and his nephew James Fay. Before probate of the will, and in November, 1871, the plaintiff had commenced this action of foreclosure against Lawrence Sheil and Lucy Sheil, his wife, and others, as heirs at law of Michael McCaffry, but subsequently, in June, 1872, on the assumed probate of the will, discontinued the action as to all the defendants, except Lawrence Sheil and Lucy Sheil. other facts necessary to an understanding of the case relating to the probate of the will are stated in the opinion.

Mr. Corbett, for the motion.

F. B. Chedsey, opposed.

Robinson, J. [After stating facts.]—The name of Sheil, as contained in the foreclosure proceeding, is different from *Shields*, the name of the devisee and husband, but if the true parties were those that were served, an amendment might be made in this respect; but until so amended the objection must prevail for such variance.

Thorn v. Shiel.

Assuming that this error is the subject of amendment, the title which the purchaser on the foreclosure sale is required to accept, depends on that which was possessed by Lawrence Shields and wife, under the devise to the latter in the will of her uncle.

The purchaser at a judicial sale is entitled to a satisfactory record title.

When derived through or under a will of real estate, he can claim that it should at least have been duly established as a will of real estate, by the decree of a court of competent jurisdiction which will afford him at least *prima facie* evidence of its validity, enabling him to maintain his title.

A will of real estate, if duly proved before a surrogate having competent jurisdiction, at most constitutes such prima facie evidence, liable to be repelled by contrary proof (1 Rev. Stat., 58, § 15; Staring v. Bowen, 6 Barb., 109; Nichols v. Romaine, 3 Abb. Pr., 124); and until the proofs and examinations taken by the surrogate shall be recorded, the record signed and certified by him, and his certificate under seal indorsed on the will, it does not become evidence (Vanderpool v. Van Nallenby, 6 N. Y. [6 Seld.], 198). Until such record is made of the proofs and will, the purchaser is in no condition to entertain any reliance on his title. In this case there has been no such record made of the proof and establishment of the will, but it simply appears that the surrogate, after taking such proofs of its execution as were offered, indorsed on the papers the words and figures "Admitted September 12, 1872."

His authority to act was, however, dependent upon his having acquired jurisdiction of the heirs at law of the testator whose title by inheritance was cut off by the will.

I can discover upon the papers presented no defect in this respect, except as to Philip McCaffry and James Fay. The only evidence upon which the surrogate ap-

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pears to have acted as against them was that contained in Lucy Shield's petition and upon proof of publication in the State paper for six weeks previous to the day appointed for taking the proof (3 Rev. Stat., 5 ed., 146, § 53, subd. 3), and there was an entire absence of any proof that they did not reside within this State or that any efforts had been made to ascertain the places of their residences, or that they "could not be ascertained;" the petition merely showed their residences were "unknown." Upon such absence of proof of the facts required by the statute to authorize the surrogate to act as against them, the proceedings had for proof of the will were void as against them for want of jurisdiction. The statutes conferring jurisdiction are to be strictly construed (Cook v. Farren, 34 Barb., 95; Wortmann v. Wortman, 17 Abb. Pr., 66; Hyatt v. Waywright, 18 How. Pr., 248; 1 Wait Pr., 530, and cases cited).*

I do not consider it necessary to examine other objections made by the purchaser, as under these considerations, he is entitled to be discharged from his purchase and to have the moneys paid thereon, and his expenses of examining the title, refunded.

Motion denied, with ten dollars costs of this motion.

^{*} Compare Farley v. McConnell, 52 N.Y., 630.

Wilmerdings v. Fowler.

WILMERDINGS against FOWLER.

Court of Appeals; September and November, 1873.

Modifying 14 Abb. Pr. N. S., 249.

APPEAL. — ATTORNEY AND CLIENT. — PAYMENT. — RE-ARGUMENT.—SUPPLEMENTARY PROCEEDINGS.

Upon appeal from an order, the court of appeals are not precluded from passing on the facts, even where the evidence is conflicting.

After the remittitur from the court of appeals has been filed in the court below, and the usual order entered thereon, it must be returned, by the direction of the lower court, before the court of appeals can grant a reargument of the appeal.*

An attorney endeavoring to enforce payment of his client's judgment, from a third person, who holds a fund which is claimed by the judgment debtor, may be deemed as acting adversely to such third person; and is not necessarily chargeable with fraud merely because he obtains payment by order of the court, while omitting to disclose to the court the existence of a rival claim to the same fund, made by a stranger to the proceedings.

In such a case, where the facts relied on by the court below as establishing fraud were not clearly made out by the evidence, which was documentary, this court reversed the order, and directed further

proceedings to be taken below.

I. September, 1873.

N. Hill Fowler applied to the court for a reargument of the appeal in this case, the decision of which was reported 14 Ante, 249. His application was based on the allegation that the decision in the court below and in this court was based on a misapprehension or mistake of facts in the following respects:

1. That it appeared by the papers that Fowler had no interest in the judgment he collected, but acted solely as attorney for Bamberger; and that he paid over the net proceeds to Bamberger.

^{*} See Cushman v. Hatfield, in this volume.

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2. That upon the face of the papers it appeared that Fowler was justified in believing Rice's claim fraudulent. That Wilmerdings' deposition was not ex-parte, but the judgment debtor had notice of the proceeding. And that Fowler was acting adversely to Wilmerdings & Mount, and he owed no professional duty to them.

And that the decision against the applicant was made on the erroneous assumption to the contrary, on these points.

In opposition to the motion, it was suggested that the application was too late, as the remittitur had been sent from this court to the court below.

Church, Ch. J.—This is a motion for reargument upon an appeal from an order requiring Mr. Fowler to pay to the applicants a sum of money which had been paid to him by them, as the debtors of one Lowenstein, upon an order made by Judge Barnard, at special term, which money had been afterwards recovered of them by one Rice, as assignee of Lowenstein.

It was alleged, in substance, that the order for the payment of the money was obtained by the fraudulent suppression of certain facts by Fowler; and both the special and general term based the order upon this charge, which they found to be true. In reviewing the order, this court adopted the finding of fact of the courts below, without a critical examination as an original question, and affirmed the order. Although in reviewing orders we are not precluded from passing upon the facts, yet when the evidence is conflicting and the facts may be found either way, we have usually regarded it safer to rely upon the findings of fact by the court below.

Upon this motion the defendant, claiming that the charge against him is not sustained, asks the court to

Wilmerdings v. Fowler.

examine it, as it may seriously affect his character as a man and his professional standing.

I have looked into the papers, and after a careful examination of the facts feel constrained to say, that I think they are insufficient to establish the charge made against Mr. Fowler of obtaining the order from Judge BARNARD by fraud.

The facts are not very clearly stated, and there is room for explanations on both sides, which would make them more clear.

I am unable to see that Mr. Fowler was under any professional obligation to the applicants in respect to their interest in the matter. On the contrary, his interest was adverse, as the attorney in the judgment against Lowenstein, the payment of which he was endeavoring to procure. If this is so, it is certainly far from clear that he violated any duty by withholding from the judge the fact that another person also claimed the money.

The order of Judge Barnard seems to be in all respects regular, and was based upon a personal examination of Mr. Wilmerding, who stated that his firm owed Lowenstein the money. The fact that Rice had commenced an action for the money was not mentioned by Wilmerding himself when examined, nor was any objection made by the firm when the money was demanded and paid, and there was no effort made by them to bring the fact to the attention of the court; and, for aught that appears, Fowler supposed that the applicants, upon the advice of their own counsel, regarded his right as superior to that of Rice.

It is intimated rather than asserted, in the moving papers, that Fowler, by some fraudulent representations or assurances, induced the applicants, or their attorney, to believe that Rice had no legal claim, and to pay the money to him. The statement of the attorney that he had frequent conversations with Fowler about

it, and that Fowler assured him that the applicants had a good defense to the action of Rice, is not sufficient to establish fraud. It is not shown that he did not believe this to be true, nor but that the attorney for the applicants knew all the facts relating to the Rice claim that he did, nor that the latter falsely stated any fact in respect to it; and from the facts appearing in the papers it is not clear that Rice had the best claim.

Again, Fowler swears that he had paid the money to his client before the papers for this motion were served; but it is claimed, that inasmuch as he does not state to whom he had paid the money, it is to be presumed that he kept it himself as one of the original plaintiffs in the judgment, or as the attorney for the plaintiffs, upon giving them credit. I am not prepared to adopt this presumption. The judgment against Lowenstein, although obtained in the name of Fowler as one of the plaintiffs, had been assigned to one Bamberger, and there is nothing in the case to impair his title. It has been suggested that Bamberger is only the nominal holder for the benefit of Fowler, but there is no evidence of this fact.

If there was no fault on the part of Fowler in obtaining the order, or the money upon it, and he paid it over in good faith to his client before this motion was made, restitution should be sought, if the applicants are entitled to it, from the client instead of the attorney.

I do not intend to say that it is clear that Fowler was guiltless of improper conduct, nor that the court was not warranted in finding the charge true. There are circumstances calculated to excite suspicion, some of which are explained, and all are capable of explanation, and they fall short of satisfying my mind of the truth of the charge. While perfect good faith on the part of attorneys towards their own clients not only, but towards the public in their professional intercourse

should be rigidly exacted by the courts, and dishonest or improper practices summarily punished, they are entitled nevertheless, when their conduct is impugned, to a fair hearing and to the benefit of the application of the ordinary rules of law meted out to others under like circumstances. An oral examination of the witnesses would probably have developed the real facts of the case, which seem from the papers to be somewhat obscure.

In view of all the facts, we might feel inclined to hear the case reargued but for the objection that it is beyond the jurisdiction of this court, by the filing of the remittitur, and entry of the usual order thereon in the court below. When that has been done regularly, we have no further jurisdiction over the case, not even to grant a motion for reargument. Before the remittitur has been actually filed we can control it, but after that and the entry of the order the case, is beyond our reach.

I see no way to avoid this objection, unless the court below should see fit to vacate the filing and order, in which case perhaps we might regard it as though the acts had never been done, but the propriety of such a course is entirely discretionary with that court.

The motion must be denied, but without prejudice and without costs.

Motion denied on that ground.

II. November, 1873.

The defendant then applied in the court below at special term and chambers, upon an affidavit and a copy of this opinion; and after hearing counsel for both parties, the court ordered that the filing of the remittitur and the order of the supreme court making

the same the order of that court, be vacated and set aside, and that the clerk be directed to return the remittitur to the court of appeals for its further action.

This having been done, a second motion for a reargument was made in this court.

Amasa J. Parker, for the appellant, in support of the motion, as to the regularity of the supplementary proceedings, cited—Code of Pro., §§ 292, 294, 297; Gibson v. Haggerty, 37 N. Y., 555; Orr's Case, 2 Abb. Pr., 457; Frederick v. Randall, 18 How. Pr., 96; Ross v. Clussman, 3 Sandf., 676.

As to the payment to the client,—Carpenter v. Bell, 19 Abb. Pr., 262; Gibson v. Haggerty (above); 3 N. Y., 327.

That the payment to Fowler was a complete defense against Rice's claim (Carpenter v. Bell (above); Gibson v. Haggerty (above).

C. Bainbridge Smith, opposed.

RAPALLO, J.—The papers upon which the motion was heard at special term do not disclose upon what ground Rice was permitted to recover against Wilmerdings & Mount. Their attorney makes affidavit that Mr. Fowler assured him that they had a good defense to the suit of Rice, and that the facts set up in their answer in that suit were furnished by Mr. Fowler. It is not alleged that any of the information thus furnished by him was untrue, nor is there anything to show that Mr. Fowler did not believe that there was a good de fense to Rice's suit. On the contrary, the attorney for Wilmerings & Mount obtained from the attorney of Rice a stipulation admitting the facts communicated by Fowler, and it is quite apparent that both Fowler and the attorney of Wilmerdings and Mount believed in the validity of the defense.

If the defense was a good one, then Fowler was

clearly entitled to collect the money either under the proceedings instituted by him as attorney for Bamberger against Lowenstein, in January, 1866, or under the order of October, 1869. If for any reason Wilmerdings & Mount failed to avail themselves of this defense, Mr. Fowler should not be prejudiced thereby as he did not represent them in the suit, and was not a party or privy thereto, and the judgment is not binding upon him. The first step necessary to entitle Wilmerdings & Mount to reclaim the money they had paid to Fowler, is to show that Rice had a good title to it, and that it was not reached by the proceedings against Lowenstein. This they have not done. It appears that supplementary proceedings were instituted by Fowler against Lowenstein in January, 1866, and he was then enjoined from making any transfer of his property, and that a receiver was appointed in those proceedings in May, 1867, who thereupon demanded of Wilmerdings & Mount the proceeds of Lowenstein's goods which they had sold.

Rice claimed under an assignment of those goods made by Lowenstein to him in December, 1866, and pending these supplementary proceedings. It does not appear whether Lowenstein was or was not, in January, 1866, when the supplementary proceedings were instituted, possessed of the goods which he afterwards consigned to Wilmerdings & Mount for sale. If he was, his alleged assignment of his interest in those goods to Rice was a violation of the injunction granted in the supplementary proceedings and its validity very doubtful, especially unless shown to be bona fide. Whether it would even then be valid, against a receiver subsequently appointed, is left an open question in Becker v. Torrance, 31 N. Y., 640; Porter v. Williams, 5 Seld., 142; Edmonston v. McLoud, 16 N. Y., 543. But even the fact of the assignment or its date is not proven on this motion. There is enough in the papers to show that the defense to the suit of Rice may have been a

good one, and to compel the moving party to show the contrary. For either Fowler or Bamberger was entitled to the money if Rice was not, and as this proceeding is to compel Fowler to pay back the money, the *onus* is upon the moving party to establish the title of Rice.

Neither is there anything to show that at the time of the examination of Mr. Wilmerding by Fowler on December 8, 1869, or at the time of the order for the payment of the money to Fowler made December 14, 1869, or at the time of the payment of the money to him under that order, Fowler had any reason to suppose that Mr. Wilmerding was ignorant of the suit brought by Rice against him and his copartners, and which had been pending since May, 1867. Such ignorance is not to be presumed, and Mr. Wilmerding does not even make affidavit to the fact. The moving papers are very deficient in these respects.

On the other hand, the papers on the part of Mr. Fowler are not sufficiently clear and satisfactory to justify the denial of the motion on the ground of the

payment of the money to Bamberger.

If Fowler obtained the money without fraud, though Wilmerdings & Mount should succeed in showing that they are entitled to have it refunded, yet the order would not be made against Mr. Fowler personally if he should show that he had collected it as attorney merely, and handed it over to his client. But this fact should be clearly shown.

The order of the special and general term should be reversed, and the motion reheard at special term on further proof in support of the motion, and in opposition thereto, by reference or otherwise as the court below may direct; costs of this appeal to abide the event.

A majority of the judges concurred.

Order reversed, and proceedings remitted accordingly.

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Geis v. Leow.

GEIS against LOEW.

New York Superior Court; General Term, June, 1873.

APPEAL.—ORDER.

An order compelling a party to make his pleading more definite and certain, is not appealable.

This action was brought by Francis J. Geis against Frederick W. Loew.

Samuel J. Glassey, for appellant.

John M. Scribner, Jr., for respondent.

Van Vorst, J.*—This is an appeal from an order made by a judge at special term, directing that the complaint be made more definite and certain, by stating in detail the several proceedings by or on behalf of the mayor, aldermen and commonalty of the city of New York, or the common council or officers of the corporation, and all acts or proceedings taken by them relating to the imposition of certain assessments by the municipal authorities, mentioned in the complaint.

The action being brought to recover the amount of the assessments, under the defendant's covenant to the plaintiff against incumbrances, it is objected by the defendant's counsel that the order is not appeable.

The order in question neither involves the merits of the action, nor does it affect a substantial right.

By the merits are to be understood the strict legal rights of the parties, as distinguished from mere questions of practice in the reformation of pleadings, and by a substantial right is to be understood a question of right involved in the issues (Salters v. Genin, 10 Abb. Pr., 478; S. C., 19 How. Pr., 233).

^{*} Present, Freedman, Curtis and Van Vorst, JJ.

Geis v. Leow.

This is simply a question of the form of a pleading, and whether or not it should set up with more detail certain special proceedings of the municipal government. It can in no manner prejudice either the plaintiff's claim, or his ultimate right to recover.

It has been repeatedly held, and as we think correctly, that orders of an analogous character with

regard to pleadings are not appealable.

Besides, refusing to strike out matter as irrelevant and redundant do not involve the merits, and are not appealable (Murphy v. Dickinson, 40 How. Pr., 66; Hughes v. Mercantile Mut. Ins. Co., 10 Abb. Pr. N. S., 37).

An order denying a motion to strike out a pleading as frivolous is not appealable (Dixon Crucible Co. v. New York City Slate Works, 57 Barb., 447).

An order denying a motion to require plaintiff to make his complaint more definite and certain is not appealable (Field v. Stewart, 8 Abb. Pr. N. S., 193; S. C., 41 How. Pr., 95; Murphy v. Dickinson, supra).

If the defendant could not have appealed had his motion been denied, no logical reason can be assigned why the plaintiff should appeal it is when granted.

In this view of the subject, it is not necessary for us to inquire or decide as to whether or not the plaintiff's complaint was required to be made more certain by the amendments mentioned in the order appealed from. This was decided by the judge at special term.

The appeal should be dismissed, and the order

should be affirmed, with costs.

Kerner v. Leonard.

KERNER against LEONARD.

Supreme Court, First Dist.; Special Term, Dec., 1873.

SERVICE OF SUMMONS.

Where service of summons is ordered to be made by publication, effecting service out of the State, before the expiration of the time for publication, does not shorten the time to answer.*

Charles H. Kerner brought this action against Amasa Leonard and his wife, for the foreclosure of a mortgage on property situated in the city of New York. The defendants resided at Morristown, New Jersey. On November 3, 1873, the plaintiff obtained an order in the usual form for the service of the summons, by publication (once a week for six weeks). On November 5, 1873, the summons and complaint were served on the defendants personally at their residence in New Jersey. On November 26, the plaintiff applied to the court for judgment as upon a default, and on the 28th of the same month judgment was entered on his application, directing sale. Before the day of sale defendants moved to set aside the judgment as irregular in being prematurely entered, the defendants' time to appear and answer not having expired.

J. R. Cuming, for defendants—Cited Abrahams v. Mitchell, 8 Abb. Pr., 125, and cases there referred to.

Edmund Coffin, Jr., for plaintiff—Cited Dykers v. Woodward, 7 How. Pr., 313.

INGRAHAM, J.—The service of a summons out of the State is equivalent to publication, but does not shorten the time. The fact that the defendant lives out of the State is a good reason why it should not. I think the motion must be granted.

^{*} This case may be regarded as finally overruling Dykers v. Woodward (7 How. Pr., 313).

THE PEOPLE on the relation of DAY against BERGEN.

Court of Appeals; December, 1873.

JUDICIAL SALE.—DUTIES OF REFEREE.

Under the usual judgment for sale in foreclosure,—directing the referee or other officer making sale, after paying his own fees and expenses of sale, and all liens for taxes, assessments and prior mortgages, to pay from the residue, the costs and the mortgage debt,—if the referee pays the sums awarded out of the residue, before paying off the liens, he does so at his peril.

It is the referee's duty to pay off liens as directed by the judgment; and he cannot relieve himself of this duty by stipulations in the terms of sale.

Although the terms of sale permit the purchaser to pay off the liens, and retain the sum out of the purchase money, he is not bound to do so, but may pay the whole price and require the referee to execute the judgment.*

If the purchaser claims that he has paid off admitted prior liens, and tenders the balance of the purchase money, an objection to the sufficiency of the proof of the payment must be made by the referee, if at all, at the time of the tender.

If the referee refuses to pay off or allow such prior liens, the court may compel him to do so.

It is no defense to proceedings to punish for contempt in disobeying an order, that an appeal is pending † (there being no stay); nor is the fact of the party's inability an excuse, where it was caused by his own disobedience.

^{*} S. P., Morange v. Morris, 3 Abb. Ct. App. Dec., 314. Otherwise held where it did not appear that the judgment required the referee to pay off the liens (Lenihan v. Hamann, 14 Abb. Pr. N. S., 274). Where the mortgagees were at hand, and ready to receive the money, and satisfy the mortgage, —Held, that the purchaser was not discharged by the referee not having paid it (Herbert v. Smith, 6 Lans., 493).

[†] Compare State v. Carlan, 2 Sandf., 738; Leland v. Smith, 3 Daly, 309; and, as to the case of an appeal from a judgment, Howe v. Searing, 10 Abb. Pr., 264; S. C., 6 Bosw., 354.

On appeal from an order punishing for contempt, the appellate court cannot consider new affidavits alleging that the party has meanwhile complied with the order of the court below.

In the case of Easton v. Pickersgill, the supreme court gave judgment of foreclosure of a mortgage, and for the sale of the real property affected thereby; and appointed the defendant in the present proceeding a referee to execute the judgment. There was a prior mortgage on the premises, and unpaid taxes, &c.

The terms of the judgment required that "out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, and any lien or liens on said premises so sold, at the time of such sale, for taxes, assessments or prior mortgage," the said referee pay, &c., the costs of the parties and the sum due on the mortgage under foreclosure, &c.

At the sale, on May 3, 1872, the relator bid off the premises for seven thousand six hundred dollars, and paid ten per cent. The terms of sale, which the relator signed at the auction, did not refer to the judgment. They required the residue of the purchase money to be paid to the referee without notice or demand; and provided that "all taxes, assessments, and incumbrances which at the time of sale are liens or incumbrances on said premises, will be allowed by the referee, out of the purchase money; provided the purchaser shall, previous to the delivery of the deed, produce to the referee proof of such liens, and duplicate receipts for the payment thereof."

On July 19 the relator paid to the referee four thousand one hundred and eighty-seven dollars and fifty-six cents, reserving in his own hands enough to pay the prior mortgage which the terms of the decree directed the referee to pay.

directed the referee to pay.

Meanwhile the prior mortgage was foreclosed by suit, and the relator thereupon paid to the creditor the

amount due thereon with the costs, and deducting the whole from the purchase money due to the referee in the first suit, tendered the balance. The referee refused to allow the deduction of the costs; and he declined to pay off the taxes, &c., on the ground that it was not his duty to search for taxes, &c., nor to pay them off, but the relator was bound by the terms of sale.

On application, the supreme court, on Dec. 20, 1872, directed the referee to apply the money in his hands to extinguish the taxes and assessments which were a lien at the time of sale, and sustained him in refusing to allow the costs of the second foreclosure, and ordered him to apply the money in his hands to the payment of the tax liens, and to give the relator a deed, on the latter tendering the sum he had withheld for costs, and producing certified copies of the tax bills.

The referee took an appeal from this order and obtained a stay of proceedings. The relator obtained from a judge at special term an order modifying the stay so far as to allow the relator to make a tender and demand, and to apply to the court on motion thereupon. The referee not complying with the order, the court ordered him to show cause why he should not be punished for contempt, and on the return of the order to show cause, the court directed that the motion be held under advisement on condition that the referee forthwith pay into court the money in his hands, and deliver a deed. This condition the referee complied with.

The court subsequently adjudged him guilty of contempt in not paying off the taxes, &c., and imposed a fine of one hundred and fifty dollars, and ordered that he be committed, &c.

The supreme court, at general term, on appeal affirmed this latter order, but with leave to the referee to obtain a repayment of moneys he had paid over to

plaintiff, and of others he had paid into court, and pay off the taxes, &c., on doing which he should have a perpetual stay of the precept.

From this order the present appeal was taken.

Samuel

the appellants.

Albert Day, in person.

BY THE COURT.—ALLEN, J.—The duties of the defendant as referee for sale of the mortgaged premises, under the judgment of foreclosure, were ministerial in their character, and a slight attention to the terms of the judgment would have prevented any controversy.

The duty of the referee was to sell the premises to the highest bidder, and after receiving the purchase money to pay therefrom his own fees and expenses on such sale, and then all liens upon said premises, existing at the time of the sale "for taxes and assessments, or prior mortgage," and from the residue pay the costs awarded to the several parties and the amount reported due the plaintiff, with the interest thereon, or so much thereof as the purchase money of the premises would pay of the same.

Such are the plain directions of the judgment, and if without or before paying the prior liens he has paid the plaintiff, and the other parties, the amounts awarded to them, he has done so at his peril and in his own wrong. The terms of the sale could not vary the judgment or relieve the referee from the performance of his duties. They did not assume to do so in this case. The fourth clause of the terms of sale permits the purchaser to substitute the payment of prior liens for money, pro tanto, in his settlement with the referee and payment of the purchase price. But if the purchaser elects to pay the money, take his deed and hold the referee to the proper execution of the judgment, he may do so.

It is true that here the purchaser did not assume this position, and it is now objected that the referee had no sufficient evidence of the prior mortgage or its payment by the relator. The answer to this is that the existence and valdity of the mortgage or its actual payment are not controverted, and the objection to the sufficiency of the evidence of either fact was not taken at the time of the tender of the balance of the purchase money and the demand of the deed. The relator does not claim to have paid the lien by taxes and assessments, and they are to be ascertained and paid by the referee.

The order of December 20, 1872, was in accordance with and execution of the judgment under which the premises were sold, and was within the jurisdiction of the court. If it was improvidently or erroneously granted, the remedy of the party aggrieved was by application to vacate it, or by appeal. It is not void and it cannot be reviewed upon an application to punish for a disobedience of it; so long as it remains in force the duty of all parties is to obey it, and the merits of the order are not reviewable (People v. Sturtevant, 9 N. Y. [5 Seld.], 263; Sullivan v. Judah, 4 Paige, 444; Higbie v. Edgerton, 3 Id., 253). Neither is it a defense in proceeding to punish for a contempt that an appeal has been taken from the order. If the proceedings have not been stayed, the party has a right to take every step for the enforcement of his civil remedy, that he might if no appeal was taken. In this case, the proceedings are not stayed, but the relator has, by express permission of the court, the privilege of making such application under the order as his counsel may advise. It is no objection to the order of the special term adjudging the defendant in contempt, that the court suspended final action for a brief period to enable the defendant to comply with the original order, or perform any act as a substitute for such compliance.

That was an act of grace to the defendant, which did not deprive the court of jurisdiction or prevent a final decision of the motion upon the merits. The defendant cannot complain that an opportunity was given him to purge the alleged contempt. The disobedience of the order, was clearly established, and if there was any disability on the part of the defendants to comply with the order, it was the result of his own act, in disregarding the terms and directions of the judgment, and he cannot avail himself of his own acts to justify a disobedience of the orders of the court, of which he was an officer.

An affidavit is annexed to the record, but which, in the nature of things, can make no part of the return to the appeal, to the effect that after the making of the order at special term, which is the subject of the appeal, the defendant did comply with the suggestions of the court, made upon suspending the final decision. If this were so, and the defendant had any claim founded upon such action, to be absolved from the contempt, he should have applied for relief to the court.

He cannot have the benefit of such action upon an appeal from the order punishing him for contempt. That must be disposed of upon the papers before the court below.

The order must be affirmed.*

A majority of the judges concurred.

^{*} The appellant moved for a reargument, which was denied.

BLOODGOOD against MICKLE.

Supreme Court, First District; Special Term, March, 1873.

HUSBAND AND WIFE.—PARTIES.—SEPARATE PROPERTY.—DEMURRER.

The equitable right of a married woman, under a trust created by another person, by which income is to be applied to her use for life, since it is not assignable, is not to be deemed her separate property;* and her husband is, therefore, a proper party to an action affecting the same.

The provision of Laws of 1860,—that a married woman may sue and be sued in all matters relating to her sole and separate property without joining her husband,—does not apply to an action affecting a mere equitable right under a trust, which is not capable of assignment.

Guardians of the property of an infant are necessary parties in an action affecting the property; and a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action against them, cannot be sustained merely because no recovery could be had in the action against the personal estate of the infants. If any cause of action calling for any relief whatever as to which the guardian should be heard, appears in the complaint, the demurrer must be overruled.

A testamentary trustee, with the approval of the general guardians of minors interested in the trust property, made a contract for the erection of a building thereon. Held, that the guardians were proper parties to the contractor's action to recover his compensation on the contract; and that the trustee having died, his administratrix was also a proper party, because, if the contract should prove to have been unauthorized, the plaintiff would be entitled to recover against the administratrix in enforcement of the trustee's individual liability.*

^{*} Compare Barry v. Equitable Life Insurance Co., 14 Abb. Pr. N. S., 385; Hann v. Van Voorhis, p. 79 of this volume.

[†] Compare Sortore v. Scott, 6 Lans., 271,

This action was brought by Matthias Bloodgood against George Benjamin Mickle and others.

Rachel Miller was seized in fee of an undivided half of certain premises situated in Dey-street, in the city of New York, together with other premises as tenant in common with one Andrew Mickle.

She died October 7, 1848, leaving a will, and leaving her surviving, Caroline Augusta Mickle, her daughter, who was married to Andrew H. Mickle, and four grandchildren, the children of said daughter, namely, George Benjamin Mickle, Rachel Augusta Mickel, Louisa Farrington Mickle, and Hannah Russel Mickle.

Caroline Augusta Mickle died on March 15, 1849. Her son, George Benjamin Mickle, is still living, having two children. Her daughter, Rachel Augusta Mickel, married William E. Lawrence, and died August 28, 1868, leaving her surviving six children, all under age, except one, and their guardians are Henry E. Lawrence and Francis E., his wife.

Louisa Farrington Mickle married Theodore Townsend, and died in August, 1862, leaving her surviving four children, all under age, and their guardian is their father.

Hannah Russel Mickle married Edward A. Lawrence, and both are still living. They have five children living.

By her will, Rachel Miller, after making certain bequests and devises, directed her trustees to receive the income of her estate and apply one-fourth part to the use of George Benjamin Mickle for life; and upon his death she devised the said one-fourth part of her estate to his heirs at law.

She further directed the trustees to apply the income of another of said fourth parts to the use of Rachel Augusta during her life, and upon her death, said one-fourth part was devised to her heirs.

She directed the income of another fourth part to

be applied to the use of Louisa Farrington, during life, and upon her death, said one-fourth part was devised to her heirs; and the income of the remaining fourth part was devised to Hannah Russel for life; and upon her death, to her heirs at law.

She appointed trustees under her will, and in or about 1864, William E. Lawrence became the sole surviving trustee thereunder.

In 1849, the lands held in common by Andrew Mickle and the estate of Sarah Miller were partitioned, and the premises in Dey-street were set apart in severalty with others to the estate of Rachel Miller.

About the year 1867, by certain proceedings in the supreme court, the mayor, aldermen and commonalty of the city of New York, for the purpose of the extension of Church-street, took possession of the greater portion of these premises, and for which an award was made of over sixty thousand dollars, which award William E. Lawrence, as trustee under the will of Rachel Miller, on June 5, 1869, received.

The remaining portion of said lot would have been entirely unproductive, unless a new building should be erected thereon.

Thereupon, William E. Lawrence, as trustee, with the approval of the general guardians of each of the parties interested, made a contract with the plainriff for putting up a building upon that portion of the lot which remained.

Lawrence paid to the plaintiff the whole amount of the contract price, except the sum of about seventeen hundred dollars, for the recovery of which this action is brought.

William E. Lawrence, on January 13, 1871, by virtue of a power contained in the will of Rachel Miller, made James N. Platt his co-trustee.

William E. Lawrence shortly after died intestate

and insolvent, and the defendant, Hannah S. Lawrence, was appointed his administrator.

In bringing this action the plaintiff has made parties defendants, among others, Edward A. Lawrence, the husband of said Hannah R. Lawrence, Henry E. Lawrence, and Frances E. his wife, guardians of the infant children of Rachel Augusta Mickle, Theodore Townsend, guardian of the infant children of Louisa Farrington Mickle, and also Hannah S. Lawrence, as administratrix of William E. Lawrence.

Upon behalf of all these defendants general demurrers have been interposed.

T. C. S. Buckley, of counsel for the defendants, Theodore Townsend and Edward A. Lawrence.

James W. Gerard, Jr., of counsel for defendants, Henry E. Lawrence and wife.

George W. Denton, of counsel for defendant, Hannah S. Lawrence, administratrix.

William Mitchell, of counsel for plaintiff.

VAN BRUNT, J.—The defendant, Edward A. Lawrence, is sued as the husband of Hannah R. Lawrence, who has only a right to the income of one of the shares mentioned in the will of Rachel Miller; and it is claimed that this, being the separate property of the defendant, Hannah R. Lawrence, in which he as her husband could have no interest, that he is not a proper party to the action.

By section 7 of the act of March 20, 1860, relating to the rights and liabilities of husband and wife, it is provided that any married woman may, while married, sue and be sued in all matters having relation to her property, which may be her sole and separate property, in the same manner as if she were sole; and the de-

cisions have been uniform, that in all actions relating to the separate estates of married women, their husbands should not be joined. It seems to have been settled by the court of appeals, in the case of Noyes v. Blakeman, 6 N. Y. [2 Seld.], 567, that such an interest as Hannah R. Lawrence has acquired, under the will of Rachel Miller, is not either property, nor is it in any sense an estate, but is merely an equitable right, which she can enforce against the trustee, and which she is incapable of assigning or disposing of. If such interest is not to be considered as her separate property, as the case cited seems to indicate, then the provision of the law of 1860 does not apply, and her husband is a proper party to any action brought in respect to it.

The defendants, Henry E. Lawrence, and Frances E. his wife, and Theodore Townsend, general guardians of the infant defendants, have also demurred to the complaint, upon the ground that the complaint does not contain facts sufficient to constitute a cause of action against them. It is to be noticed that it is not pretended that the plaintiff has any cause of action against them, or either of them individually, and the demurrer seems to be based upon the ground that no recovery against the personal estate represented by the general guardians can be had in this action.

For the purpose of disposing of this demurrer, I do not think it at all necessary to consider this question, because, if any cause of action calling for any relief whatever, as to which the guardians should be heard, is made out by the complaint, the demurrer must be overruled. It seems to have been conceded that the plaintiff has some equitable rights against the premises or trustee, and if any equitable lien is to be established by means of this action against the share of the infant defendants, the guardians are necessary parties, because they are not only entitled to receive

the share of all income of the infants arising from the real estate, but are also supposed to be in joint possession thereof with the trustee; and if this income is to be burdened in any way, or this possession is to be disturbed, they undoubtedly have the right to be heard upon that question; and no court would make any decree or judgment in their absence.

I do not deem it necessary to determine whether the guardians had any right to use their wards' money for the improvement of their real ertate, or how far they may be estopped by their assent to the contract mentioned in the complaint, because it seems to me that under the complaint the plaintiff might make out such a case as would justify the court in giving him some security for the debt upon the premises improved by his expenditures, although I much doubt if it would take any part of the other estate of the infants to liquidate any such claim.

The defendant, Hannah S. Lawrence, as administratrix of William E. Lawrence, deceased, has also

put in a general demurrer.

She is undobubtedly a proper party; because if the court upon the trial of this cause should hold that the contract made by the plaintiff with Lawrence as trustee should not be ratified, and that Lawrence had no power to make any such contract, then Lawrence would be held individually liable for the amount due the plaintiff, and the court would give judgment accordingly against his administratrix.

The demurrer must be overruled.

CUSHMAN against HADFIELD.

Court of Appeals; May, 1873.

STAY OF PROCEEDINGS.—REMITTITUR.—FILING.—RE-

Rule 16 of this court,—which provides that either of the judges may make orders to stay proceedings, which, when served with papers and notice of motion, shall stay the proceedings,—does not prevent a judge from staying the filing of a remittitur without service of papers and notice of motion.

A single judge of the court may order the filing of a remittitur to be stayed, in whosesoever hands it may be, at any time before it is

actually and regularly filed in the court below.*

The mere coming of the remittitur to the hands of the clerk of the court below, is not an actual filing. So held where, on being served with the stay, he handed the remittitur back to the attorney, without having marked it filed, and expressly refused to file it.

Wm. Watson, of counsel for the appellants, moved upon affidavits, that the remittitur in this action be taken from the files of the supreme court, and that the

^{*} As to revoking a remittitur or mandate granted by mistake or under a misrepresentation of facts, see United States v. Gomez, 28 How. U. S., 326; Exp. Crenshaw, 15 Pet., 119. The case in the text overrules Lawrence v. Bank of the Republic, 6 Robt., 497, and also overrules Judson v. Gray, 17 How. Pr. 289 (Supreme Ct.), so far as it held that the delivery of the remittitur to the attorney in itself reinstated the jurisdiction of the court below. To the same effect with the case in the text, on this point, is Burckle v. Luce, 1 N. Y., 289, and see Martin v. Wilson, Id., 240. See also Wilmerdings v. Fowler, p. 86 of this vol.

[†] As to what constitutes filing, compare Cullen v. Miller, 9 N. Y. Leg. Obs., 62; Bishop v. Cook, 13 Barb., 326; Griswold v. Sheldon, 4 N. Y.. 581; Dodge v. Potter, 18 Barb., 193; Fox v. Burns, 12 Id., 677; Swift v. Hart, Id., 530; 14 Tex., 339; 13 Vin. Abr., 211.

filing thereof be declared void, on the ground that such filing was in contempt of an order of one of the judges of this court, and for a reargument.

In this action, which was brought by J. Holbrook Cushman and others, executors, &c., -judgment in favor of the defendants, Amos F. Hatfield and others, was on February 11, 1873, affirmed by this court with costs, on the authority of a recent decision of the commision of appeals in the case of Loeschigk against the same defendants, 51 N. Y., 660, sustaining the validity of the same transfers which were in controversy in this action. The remittitur was received by the defendant's attorney on February 13. On or about the same day, upon an affidavit stating among other things that the appellant's attorney was about to move the commission of appeals on March 4, for a reargument of the case of Loeschigk v. Hatfield, one of the judges of this court made an order staying the filing of the remittitur herein until March 4, and the decision of the commission of appeals, &c. This order was received by the appellant's attorney by mail on Saturday, February 15. The appellant's attorney makes affidavit that on that day, and before the remittitur had been filed, he served the order upon the clerk in the office of the clerk of the supreme court, whose duty it was to file remittiturs, and that shortly after such service the managing clerk of the respondent's attorney, presented to the deputy county clerk a bill of costs for adjustment, whereupon the appellant's attorney exhibited to such deputy clerk and managing clerk the order of stay, and the deputy clerk thereupon refused to file the remittitur and proceed with the taxation. The managing clerk of the respondent's attorney deposes that on the occasion referred to and before the service of the stay or its exhibition to the deputy county clerk, he handed the remittitur to such deputy for filing, and that a few min-

utes thereafter the appellant's attorney served the stay on such deputy; that thereupon the deputy said he would not file the remittitur, and offered it to deponent who refused to take it back, insisting that it had been filed, and that it has ever since remained in the possession of the county clerk. The managing clerk immediately returned to the office of the respondent's attorney and reported to him what had transpired at the county clerk's office.

The order had not then been served on the respondent's attorney, and was not served until Monday, the 17th, at 9 A. M.

No notice of motion was served therewith.

On the 17th an order was entered by said managing clerk making the judgment of this court the judgment of the supreme court on the assumption that the remittitur had been filed on February 15.

On the same day, February 17, notice of adjustment of costs for February 19 was served on respondent's attorney. He attended in pursuance of the notice and objected to the adjustment on the ground that the remittitur not being filed the supreme court had no jurisdiction; the other side claimed that the stay was void. Thereupon the adjustment was adjourned, and an order was made by one of the justices of the supreme court staying all proceedings until March 4, pursuant to the original order. This last stay was vacated, on motion at special term, on the ground, as is alleged, that the remittitur not having been filed, the cause was yet in this court.

It is stated in the affidavits that the remittitur has been filed and judgment entered thereon, and proceedings thereon stayed by the supreme court till the decision of this action.

Mr. Townsend, the attorney for the defendant, makes affidavit that he was not informed of the first stay until after he was informed by his managing clerk that the

remittitur had been filed, and that it was not served upon him until afterwards, and that when it was shown to him he was and still is of opinion that it did not stay proceedings, and was not intended so to do unless accompanied with affidavits and notice of motion as prescribed by Rule 16; and that no contempt was intended.

Mr. Dyett, his law partner, and counsel for respondent, deposes substantially to the same effect, and that his action in the matter was based upon the belief and assumption of the truth of the fact stated in the affidavit of the managing clerk, and that there has been no filing of the remititur to his knowledge since February 15, and he claims that it was filed the instant it was handed to the clerk, notwithstanding the clerk's subsequent refusal to file it, and that therefore it was filed before the service of the stay.

The motion for a reargument in the case of Loeschigk v. Hatfield, has been made in the commission of appeals, and was denied on March 11, last.

Wm. Watson, for the motion.

A. R. Dyett, opposed.

RAPALLO, J.—The only question of any general importance involved in this motion, is that of the validity of an order of a single judge of this court staying the issue or filing of a remittitur. Rule 16 of this court provides that either of the judges may make orders to stay proceedings, which, when served with papers and notice of motion, shall stay the proceedings according to the terms of the order; and it is claimed on the part of the respondents that under this rule the order made in the present case staying the filing of the remittitur was not operative, for the reason that motion papers and notice of motion were not served therewith.

It has long been the practice in this court for a

single judge to stay the remittitur or the filing thereof without reference to this rule.

Cases sometimes occur in which the power summarily to grant such a stay is essential to prevent injustice.

In the absence of such a power the court might lose jurisdiction of a case, and thus render irremediable any oversight which may have happened.

Such orders have frequently been granted on the mere suggestion of counsel, and the knowledge of the case derived by the judge from the argument. They may be necessary for the very purpose of affording to the applicant an opportunity to prepare papers, and move the court for the correction of its judgment in matters of detail, or for such other relief as the case may demand. If the order thus granted could not be effectual until the motion papers were prepared and served therewith, the remittitur might in the meantime be regularly filed, and this court thus lose its jurisdiction over the case. This court therefore exercises control over its own remittitur, and recognizes the power of either of the judges to stay it, in whosesoever hands it may be before it is actually and regularly filed in the court below. If this power could not be exercised by a single judge it would be impracticable to stay the filing of a remittitur when the court is not in session.

Rule 16 is applicable to general stays of proceedings by the parties in this court in causes pending here. After having given full consideration to the subject the court is of opinion that the rule is not applicable to an order temporarily staying the filing of the remittitur, and that the order of any one of the judges for that purpose is valid and operative, though not accompanied by motion papers or notice of motion.

Until actually and regularly filed, the remittitur is under the control of the court, and it has power to direct as to the disposition to be made of it, even

though it may have been entrusted to the attorney of the party for the purpose of being transmitted to and filed in the court below.

In Murray v. Blatchford, 2 Wend., 221, the court of errors retained jurisdiction of the cause and corrected its decree, though the remittitur had actually reached the hands of the register in chancery and was in his possession, and had been by him marked filed, the chancellor having ordered that the mark of filing be struck out and the filing suspended. Whenever there is any irregularity either in the entry of the order of this court, or in remitting the proceedings to the court below, the court does not lose jurisdiction (Legg v. Overbaugh, 4 Wend., 188; Waters v. Travis, 8 Johns., 566; McFarlan v. Watson,* 4 How. Pr., 128).

The affidavits on this motion leave it somewhat in doubt whether there ever was any actual filing of the remittitur; but if actually filed such filing was irregular, being in violation of the stay which was was exhibited at the time the remittitur was offered to the clerk for filing. The fact that the clerk took the paper into his hands and immediately on being served with the stay refused to file it, and tendered it back to the party offering it, constituted no filing. It does not even appear that he marked it filed. The position assumed in this respect shows an attempt to evade the stay, but is not worthy of serious consideration. The counsel for the respondent and his managing clerk now assert that there has been no other filing. This shows that there can have been no filing since the stay expired,

^{*} In this case the court did not, as stated in the report, decide that a remittitur was not proper on the dismissal of an appeal (Langley v. Warner, 2 Code R., 97). The remittitur there was irregular because on dismissal of an appeal from an order, it remitted the record of the accompaning appeal from a judgment; and such an irregular remittitur, though actually filed, does not, as shown by the case in the text, deprive the appellate court of jurisdiction.

therefore there is no legal impediment to our entertaining the motion for a reargument.

[Remarks as to the reasons for denying the motion for reargument, and as to the charge of contempt in endeavoring to file the remittitur are here omitted; the learned judge concluding as follows:]

As they [the attorneys] swear that no contempt was intended, and that they believed that the order of stay was not operative until served with papers and notice of motion, and as the language of Rule 16 and the decision of Chief Justice Robertson in Lawrence v. Bank of the Republic, 6 Robt., 497, afford some color for that view, and no actual injury has resulted from their proceedings, we have concluded that the case does not call for any action of the court on that branch of the motion.

The motion should be denied, without costs.

All the judges concurred.

Motion denied, without costs.

TRENOR against JACKSON.

New York Superior Court; Special Term, July, 1873.

INJUNCTION.—AWNINGS.—LANDLORD AND TENANT.— COVENANT NOT TO ALTER.—NUISANCE.

The erection, on the sidewalk, of a permanent awning, screwed to the house, is a violation of a covenant not to make any alteration in the house.

Such a breach of covenant, however, is not ground for an injunction at the suit of the lessor, especially where the lease reserves a right of re-entry for breach of covenant.

The corporation of the city of New York, since its ownership of the streets is in trust for the benefit of the general public, has no power to sanction the erection, for private purposes, of awnings upon the sidewalks, which obstruct the public use of the way.

Any person who sustains a private injury from the erection or continuance of a public nuisance, may maintain an action therefor.

A structure which, though not hurtful to health or noxious to the senses, interferes with the comfortable enjoyment of life or property, is a nuisance within this rule.

The lessee of a building who sublets it, may have an injunction against the erection of an awning, which would be a nuisance to his subtenants, although he is neither owner of the fee, nor an occupant.

The fact that he has a remedy in damages for a breach of covenant, does not preclude an action for an injunction on the ground of nuisance.*

Motion to continue injunction.

This action was brought by John J. Trenor against James S. Jackson. The plaintiff is the lessee, for a term of ten years from May, 1870, of the premises on the southeast corner of Sixth-av. and Forty-eighth-st., in the city of New York, and known as Nos. 842, 844, 846 and 848 Sixth-avenue. Upon and covering the whole premises is a five-story building, the first story of which is occupied by the defendant as a grocery store, and the stories above are separated into eleven flats or suits of apartments, intended and used as family residences, and let by the plaintiff to separate and different families, who are now occupying the same.

In March, 1871, the plaintiff let to the defendant the store part of said building for a term of nine years from May, 1871.

The lease contains a covenant by the defendant, that he will not "make any alterations therein without the written consent of the party of the first part, under the penalty of forfeiture and damages."

The complaint then alleges, that the defendant has commenced, is continuing, and threatens to finish the construction of a large wooden shed, "which he calls an awning," entirely around said building, with the exception of the doorways leading to the upper part thereof. That such shed is being so constructed as to form a covering from the building at the height of the store, extending to the curbstone in the street, on that portion of the premises fronting on Sixth-avenue, and on Forty-eighth street, thus entirely intercepting the view of the sidewalks from any of the windows of the building above the shed, and also obstructing a view of the streets from many of the windows.

The erection and continuance of such shed, the plaintiff alleges, will greatly injure the value of the building for the purposes for which it is now used, and impede and hinder the renting thereof; and already several of the tenants thereof have declared that they will remove therefrom, if such erection is continued and completed.

Upon these facts a preliminary injunction was granted, restraining the defendant from completing the shed, with an order to show cause why the injunction should not be made permanent during the pendency of the action.

Upon the return of the order, the defendant by his answer averred that the awning which he proposes to erect is the kind of awning usually erected in front of stores such as that occupied by him. He denied that such erection was an alteration in the premises leased by him. He further denied the plaintiff's allegation of injury to the other parts of the premises, or that it would obstruct the view or impede the renting thereof.

In his affidavit the defendant averred, that it is considered proper to have wooden awnings in order to protect the goods in the store from the effects of the sun in the summer: that the awning posts are not

larger than an ordinary lamp-post with the postage-box attached, and do not obstruct the street as much as such lamp posts: that they were erected under the direction of the city authorities, and are not a nuisance, and do not obstruct walking along the sidewalks so much as the ordinary lamp-posts.

The affidavit of the carpenter stated that he was erecting the awning in the usual manner of constructing wooden awnings in this city. That the only alteration made was in screwing a cleat along the front part of the building, which can at any time be unscrewed. He further stated that the awning was being erected pursuant to a permit granted by the city, and under the inspection of a city inspector.

The permit is as follows:

"180. "Awning.—(Wood). "Permit.

"DEPARTMENT OF PUBLIC WORKS,
"BUREAU OF INCUMBRANCES,
"No. 237 Broadway,
"New York, June 7th, 1873.

"Permission is hereby granted to James S. Jackson, of Nos. 846 and 848 Sixth-avenue of New York city, to erect a wooden awning in front of the premises known as Nos. 846 and 848 Sixth-avenue, in said city, according to law and ordinances, viz:

"Posts not to exceed nine inches in diameter.

"Cross-rail not to exceed seven inches in width or height.

"Cross-rail not to exceed four inches in thickness.

"Posts to be placed next to and along the inside of the curbstone.

"Rail on upper side not to be less than eight nor more than ten feet in height above the sidewalk.

"Cross-rail to be strongly mortised through the upright posts.

"Said awning to remain only during the pleasure of the commissioner of public works.

"GEO. M. VAN NORT, "Commissioner of Public Works.

"E. B. SHAFER,

"Superintendent of Incumbrances."

R. H. Huntley, for plaintiff.

Albert Matthews, for defendant.

MONELL, J.—The grounds upon which the plaintiff claims to hold the injunction in this case, are, first, that the acts of the defendant are in violation of his covenant; and, second, that the erection of the wooden shed is a public nuisance, or at least a purpresture, injurious to the private interests of the plaintiff.

The covenant alleged to have been broken is, that the defendant will not make any alterations in the demised premises; and it is claimed that the erection of the shed, being outside the building, is not an alteration in the building. But I think that too narrow a construction of the covenant. It appears that the structure rests upon and is secured to a cleat fastened or screwed to the front of the building, running along its entire front and side, and forming partly the support to the shed.

To sustain this cleat, the screws have necessarily been inserted into the front of the building, and to that extent, taken in a literal sense, it is an alteration in the building. But I think "in" is to be taken as including upon as well; so that the covenant may read, "alteration in or upon," and cover the erection which the defendant has annexed to it. Such undoubtedly was the intention of the parties; otherwise, any alteration of the exterior of the building would be no breach; and the tenant could remove the entire front of his

store, and work serious injury to the building, under claim that it was not an alteration "in" the building.

The fair construction of the covenant, therefore, is that the lessee shall not make any alteration of the premises, so as in any respect to change them from the condition they were in when he made his covenant, without first obtaining the consent of his landlord. Such a covenant is reasonable and proper. It is for the protection of the owner against any nuisance by his tenant, and in aid of his remedies for injury to his property.

Although I regard the acts of the defendant as violations of his covenant, yet I do not think them sufficient to authorize the exercise of the restraining

power of the court.

The injury to the plaintiff's rights or interests are not irreparable, or such as cannot be probably satisfied at law. The damages for the breach are, I think, capable of being ascertained, and a recovery of such damages at law would be a satisfaction, and would cover the continuance of the injury, as well as the present damage.

But another remedy at law is provided. Under the terms of the lease the lessor has reserved the right to re-enter for covenants broken, and may maintain his action to recover possession of the demised premises.

Where the remedy or remedies at law are adequate,

a court of equity will not exercise jurisdiction.

The plaintiff, however, has shaped his case so as to bring it within equity recognition, by alleging that the structure is being erected by the defendant upon one of the public streets of the city of New York, without lawful authority, and is injurious to the private interests of the plaintiff.

It was conceded by the plaintiff's counsel that the erection of the shed or awning in question, if erected without lawful authority, would be a public nuisance;

and if found to be injurious to any private rights, would be amenable to the restraining power of the court, at the suit of such private person.

Conceding this, the defendant rests upon the permission derived from the city authorities, which undoubtedly will justify his acts, if the power is vested

in the city to give such permission.

A purpresture or even a public nuisance cannot be predicated of the exercise of lawful authority; and this brings me to the consideration of the question involving the power of the municipal authorities of this city to allow or permit the erection and continuance of what, without the requisite power to permit, would be a public nuisance.

It is claimed that the authority is derived from the charter of 1870 (Laws of 1870, ch. 137), which provides that "the common council shall have power to make, continue, modify and repeal such ordinances, regulations and resolutions as may be necessary to carry into effect any and all the powers now vested in or by this act conferred upon the corporation, . . . and to make such ordinances . . . in the matters and for the purposes following: . . 10. To regulate the use of the streets and sidewalks for signs, sign-posts, awnings, awnings, awnings, and horse-troughs."

The Sixth-avenue and Forty-eighth-street, upon which these premises are situated, were taken by the city authorities, under the provisions of the act of 1813, which declares that the city "shall become and be seized in fee" of all such lands so taken (Valentine's Laws, 1198). But the seizin or title of the city is qualified, however, by the further provision, "In trust, nevertheless, that the same be appropriated and kept open for, or as part of, a public street, avenue . . . forever, in like manner as the other public streets, avenues . . . in said city are and of right ought to be." In People v. Kerr, 27 N. Y., 188, this qualified

or restricted fee in the city is said to be more than was supposed to be needed by the public in the case of ordinary roads. But the court say (p. 197), that "the interest or estate thus conferred upon the city is limited and not absolute—limited by the purposes of the grant, notwithstanding the broad language of the statute." Again: "the grant is expressly upon trust, for a public purpose, that the lands may be appropriated and used for ever as public streets."

The title conferred upon this public agent is wholly for public purposes, and not for profit or emolument of the city. . . . The city has neither the right nor the power to apply any such property to other than public uses, and those included within the objects of the grant." This trust is for the benefit of the general public, not for the adjacent proprietors alone, nor of the inhabitants or citizens of New York alone, but of the whole people. In Drake v. Hudson River R. R. Co., 7 Barb., 508, this limitation of title is fully recognized.

The right to condemn private property to public use is one of the highest prerogatives of the sovereign power. It is conferred in all organic laws, and is inseparable from the functions of government. But its exercise is carefully controlled within the limits of a public necessity; and hence when such public necessity for its exercise is apparent, everything in the name of private interest must yield. Salus populi suprema lex.

While, therefore, the public necessities may incite the action of the sovereign power to condemn to its use the private property of its citizens, it can only be done for the purposes required; and when such purpose ceases, or the public necessity no longer exists, the property taken may, and in some cases does revert to the original owner; as where land was taken under the railroad act of 1848, the railroad company acquired it only during the continuance of the corporation

(Laws of 1848, p. 228, § 20; Mahon r. New York Central R. R. Co., 24 N. Y., 658). Whether in the event of the disuse of a public street in this city, which had been appropriated under the act of 1813, the land would revert to the original owner, or his assigns, it is not necessary here to inquire. It is enough, for the purposes of this question, that the city holds the fee in trust, and cannot, without the amplest authority, divert its use, or allow its use to be diverted from the exclusive public use.

The principle which inhibits or limits the exercise of the legislative power over private property, must necessarily carry us to the extent, that after having exercised the right for the purpose and in the manner prescribed by the constitution of the State, it cannot afterwards appropriate property thus taken, either wholly or in part to private uses. Such a right is not found in the organic law, and is opposed by its letter and spirit. The public necessity ceasing, the original right of the sovereign to repossess the lands would cease also; and the doctrine of reverter might well apply. So long as the public remain in the exclusive enjoyment of the franchise or property, the title acquired through the exercise of the right of eminent domain will of course continue: but whenever such exclusive enjoyment is interrupted by private use, however sanctioned, the purposes of the grant are defeated.

In Drake v. Hudson River R. R. Co., supra, the power of the corporation over the streets of the city was held to be such, that it could grant permission to a railroad company to use a portion of the streets for a railroad track.

But the decision rests wholly upon the ground that such use is not inconsistent with the common or public right. It was not, the court say, "incompatible with the trusts of public streets, and the simultaneous use of those streets by other carriages and vehicles, and for

all the purposes to which streets are dedicated." But the court fully sustains the right of the public to the full and free use of the streets, and of individuals whose tenements front upon them. There is nothing in this case which sanctions any use of the public streets for merely private purposes. Such use is distinctly repudiated and denied.

So far as the power of the corporation on the subject is sustained by that decision, it must be regarded as overruled by the two later cases of Davis v. Mayor, &c., 14 N. Y. [4 Kern.], 506, and People v. Kerr, 27 Id., 188. In the case of Davis it was held that use of a public street for a railroad was incompatible with the public use; and in the Kerr case, although the inconsistency of use was denied, the court found no power in the corporation to make the grant, but sustained the grant by the legislature.

It is claimed that the power given by the charter to pass ordinances for the regulation of the use of the sidewalks for awnings, &c., necessarily *implies* a power to allow or permit the erection and continuance of

awnings by individuals for private purposes.

The difficulty with this position is, that even if it was competent for the legislature to give such power, it is not given by any express terms, and being subversive of a clear public right, it cannot and should not be implied. It is, I think, very clear that a trust created by law for a strictly public purpose, cannot be diverted from such purpose, and converted into a private use. But even if it can be at all, it must be done by express enactment, and never can be inferred from or as being incidental to other powers.

In Davis v. Mayor, &c., supra, the corporation had by resolution given authority to the railroad company to construct their railroad in and upon the streets of the city. That resolution was passed under the charter of 1849, which did not contain the words found in the

charter of 1870. But Judge Denio, after overruling Drake v. Hudson River R. R. Co., and holding that a railroad was distinguished from every other species of way, says (p. 517), that for such reason the establishment of such a road is not within the jurisdiction conferred upon the corporation over the roads and streets in that city, "and that, therefore, the resolution of the common council granting the right was without the scope of the powers of the corporation, and was wholly unauthorized and illegal."

In People v. Kerr, supra, the court, while sustaining the power of the legislature over the subject, was compelled to adopt the principle decided in the Drake case, and to limit the decision in the Davis case to the single point, of authority in the common council to make the grant. And the court there held, that because the use by a railroad was not inconsistent with the public use, and further that as a railroad was, at least to some extent, a public use, the legislature might lawfully allow its construction.

In the recent case of Kellinger v. Forty-second-street, &c. R. R. Co., (50 N. Y., 206), the plaintiff sought to restrain the company from using their track in front of his premises. In reviewing the several decisions, the court makes from them all the general deduction, that railroads being for a public use were within the uses to which the streets may be devoted. The court say: "The fee being in the public, the legislative authority can lawfully consent to modify, regulate or enlarge its uses for the benefit of the public."

Whatever may be the conflict of decision as to the use by a railroad being inconsistent with the public use (and the following may be referred to as exhibiting such conflict: Drake v. Hudson R. R. R. Co., supra; Davis v. Mayor, Id.; People v. Kerr, Id.; Baldwin v. Mayor, 2 Keyes, 387, 417; Craig v. Rochester C. & B. R. Co., 39 N. Y., 404), all the cases place their

decisions, upholding the *legislative* power, upon the ground either that it is not an inconsistent use, or that it is a public necessity, and therefore a taking for public use. Without one or the other of these elements, no case that I can find admits a power in the legislature, to legalize the use of a public street for private purposes.

In the case before me, the appropriation of a part of one of the public streets of the city, is for an exclu-

sive private purpose.

The defendant and not the public will derive the benefit and advantage from the structure. He says it is needed to protect the goods in his store from injury by the sun; but it does not appear that he does not intend to also use the sidewalk beneath it, as a mart for the exhibition and sale of his goods; nor does it appear that some other and less objectionable kind of awning might not be used.

It cannot, therefore, be claimed that such use of the street is not inconsistent with the public use, or that it is for a public purpose. The corporation, holding the streets in trust for the public, have exceeded their powers in attempting to authorize such appropriation, and the erection and continuance of the structure complained of is, in my judgment, without authority of law.

Any use of a public street incompatible with the public use, if unauthorized by law, whatever may be its

degree, is a public nuisance.

An appropriation of a part of a public river by an individual, without grant, is a nuisance (Hart v. Mayor, &c., 9 Wend., 571.) So, a continued encroachment upon a street, though for the purpose of carrying on a lawful business is unjustifiable (People v. Cunningham, 1 Denio, 524; and see Moshier v. U. & S. R. R. Co., 8 Barb., 427; Hecker v. N. Y. Bal. Dock Co., 13 How. Pr., 549; People v. Vanderbilt, 24 Id., 301). In Irvin

r. Wood (4 Robt., 138), an opening in a sidewalk (coal slide) for private purposes, was held to be a nuisance.

Any person who sustains a private injury from the erection or continuance of a public nuisance may maintain an action. In people v. Kerr, supra, the court say (p. 193), "any person who suffers a private and peculiar injury from the commission of a public nuisance, may maintain his own individual action for redress or prevention of the wrong;" and in Davis v. Mayor, &c., supra, it is said to be "well settled that when such an offense occasions, or is likely to occasion, a special injury to an individual, which cannot well be compensated in damages, equity will entertain jurisdiction of the case at his suit."

The private and peculiar injury to the plaintiff, is, I think, sufficiently manifest. The effect of the structure erected by the defendant is, to deprive the plaintiff, in part at least, of the beneficial enjoyment of his property. And any unlawful interruption of, or interference with, the full and free enjoyment of an other's property, by creating or continuing a public nuisance, renders such person amenable to an action.

It is not necessary that it should be hurtful to health or noxious to the senses; if it interferes with the comfortable enjoyment of life or of property, it becomes a nuisance, abatable at the suit of private persons.

It has been urged that an authority in the corporation can be found in its long and very frequent exercise of the power in different parts of the city. But judicially I cannot admit the force of this. If the corporation has not the power, the assumption of it, in any number of instances, will not create such power. It must be found to exist outside of its own practices and precedents.

It is also suggested that the process of injunction should be withheld, because, neither the owner of the

fee nor the actual occupants complain. It is enough, I think, that the plaintiff is sustaining injury by the defendant's unauthorized act. He has a right to complain, and I think I have shown that he is not bound to resort to an action at law for damages.

The case in this court of Masterson v. Short, having been decided one way, on the motion for an injunction (3 Abb. Pr. N. S., 154), and the other way, on the trial of the action (7 Robt., 299), it creates no embarrassment in the decision of this case.

A part of the relief sought is a compulsory judgment requiring the removal of the structure. Such relief could not be obtained at law.

My examination of the questions upon this motion has led to the conclusion, that the permission granted by the corporation of New York to erect the shed or awning upon one of the public streets of the city, is and was not authorized by law.

That being erected in such place, without sanction of law, it is a public nuisance and as such being injurious to the private interests of the plaintiff, he is entitled to a continuance of the injunction.

The fear expressed by the defendant's counsel that a decision adverse to the defendant might disturb a very large number of similar structures, even if it was well grounded, could not influence the decision in this case.

But I do not think there is much ground for it. It is only by a person specially injured that an action will lie. Such cases are and must be very few.

Motion to continue injunction granted, with costs.

COULTER against MURRAY.

New York Common Pleas; Special Term, November, 1873.

POLICE JUSTICES.—INJUNCTION.

The term of office of police justice in the city of New York, is not vested by the constitution; but is subject to legislative control.

An injunction does not issue to restrain a party from taking possession of an office and its books and papers, under color of title thereto.*

Application for a permanent injunction.

Elbridge T. Gerry, for plaintiff.

John K. Porter, Dorman B. Eaton, Nelson J. Waterbury, and James M. Smith, for defendants.

LARREMORE, J.—It is alleged in the complaint in this action that at a general election held in the city or New York, December 7, 1869, the plaintiff was elected to the office of police justice for the seventh judicial district of said city for the term of six years from January 1, 1870, of which election a certificate in due form was issued by the proper authorities. That on

^{*} Compare Palmer v. Foley, 45 How. Pr., 110; affirming and modifying 44 Id., 308, where it was held that an officer who is disturbed in the exercise of his office by a person claiming to be deputy under an alleged appointment by a third officer, the validity of which the principal disputes, may have an injunction to restrain the claimant from entering upon or interfering with the duties of the office until his right to the office has been duly established. This is not a mere case of trespass; and an injunction is a proper remedy in lieu of others which might produce confusion, disorder and public inconvenience.

the day last named he took the oath of office and entered upon the discharge of his duties as such police justice, and has ever since continued to discharge the same: that he is entitled to the emoluments thereof, and to hold and possess the books and papers belonging thereto. That on February 11, 1870, the attorney general, in the name of the people of the State of New York, upon the relation of the defendant Murray, did commence an action in the nature of a quo warranto to try plaintiff's title to said office, to which it was therein alleged said Murray was elected and entitled. That issue was joined therein, and said proceeding is still pending. It is further alleged that the defendants have unlawfully confederated and conspired together to interrupt the plaintiff in the performance of the duties of said office, and oust him therefrom on November 4, 1873; that defendants have openly threatened to do so by force and violence as well as to institute a prosecution against him in case he should refuse to deliver possession of said office on demand thereof by the defendants; that they did secretly assemble at a time and place stated, and did then and there unlawfully conspire and agree, and did designate the defendant Murray as the person in whose name and under whose direction the wrongs and violence apprehended and complained of should be done.

The plaintiff then asks the judgment of the court that the defendants, individually and collectively, their attorneys and agents, be enjoined from doing, or causing to be done, any of said acts, or from interrupting or embarrassing him in the exercise of the duties of his said office until the expiration of the term thereof, or until final judgment shall be rendered against him in said action of quo warranto; and that they be further enjoined from intruding on him in said office, or from making any demand for the books and papers belonging thereto, or from instituting any proceeding for the

recovery thereof, otherwise than by an action of quo warranto.

The question might here be raised, whether, upon the facts stated, a criminal conspiracy has not been established for which the law has provided an adequate remedy, and for the prevention of which a court of equity would refuse to interfere.

But the affidavits of the defendants, read in opposition to this application, explain and define the real

position of the parties to this contest.

The defendants allege that on May 17, 1873, an act was passed by the legislature of this State, entitled "An act to secure better administration in the police courts of the city of New York" (Laws of 1873, ch. 538), providing for the appointment of police justices in said city, and abolishing all existing provisions of law for the election of such officers. That in said act it is further provided that when appointments of police justices shall have been made as therein prescribed, all the powers, authority and luty appertaining to any police justice in said city, or which might appertain to any such justice then in office under laws theretofore existing, should belong to and be exercised and performed by the police justices appointed thereunder. That at the time when the justices so to be appointed shall acquire the powers aforesaid, the tenure, salaries and authority of the police justices theretofore existing in said city should cease and determine.

That the officers last named are by said act required to deliver all the papers, documents and retords appertaining to their said office to such new police justices, who are authorized to continue and complete any pending inquiry, action and proceeding in the police

courts or special sessions.

The defendants further allege that in pursuance of said act of May 17, 1873, they have been duly appointed and commissioned as police justices of the city of New

York, and they severally deny that plaintiff is a police justice of said city, or that he has any right to said office. The equities are thus as broadly denied as though an answer had been interposed (Perkins v. Warren, 6 How. Pr., 341). The plaintiff has not traversed the statement of the defendants as to their appointment under such act, but insists that the same, as to him, is unconstitutional and void.

The decisive question in this case has a direct relation to the character of the office which plaintiff seeks to retain, viz: Is a police justice of the city of New York a constitutional officer, within the purview and meaning of the constitution of 1846?

It is therein provided that, "All judicial officers of cities and villages, and all such judicial officers as may be created therein by law, shall be elected at such times and in such manner as the legislature may direct" (Const. of 1846, art. 6, § 18.)

When the convention met to frame said instrument there existed, in the city of New York, two classes of justices of inferior jurisdiction, viz: Special justices and assistant justices, appointed by the common council of said city. In the organization of inferior tribunals by said convention, the said special and assistant justices were excepted, and their subsequent jurisdiction and continuance left to the action of the law (See Debates Const. Convention 1846, pp. 818, 820).

Thus from being permanent officers, as they were under the constitution of 1822 (art. 4, § 14), they were left as appointive officers by the constitution of 1846 subject to legislative action. Such action was taken March 30, 1848, whereby the terms of said officers were abridged and the offices held by them abolished.

By an act passed March 30, 1848, entitled "An act in relation to justices and police courts in the city of New York" (Laws of 1848, ch. 153), said city was

divded into six judicial districts, in each of which it was directed that one police justice should be elected for the term of four years, and who should have all the powers and perform all the duties of the special justices for preserving the peace in said city, which last named office was thereby abolished.

This (so far as I have been able to find) is the first statutory mention of the office of police justice for said city.

It is a new and distinct office, not in existence when the Constitution of 1846 took effect, but was established

in pursuance of its provisions.

Subsequent legislation increased the number of judicial districts in said city, and on April 28, 1869, an act was passed defining the seventh judicial district of said city, and providing for the election of a police justice therein, who should hold office for six years from January 1, 1870 (Laws of 1869, ch. 377.)

Under this act plaintiff claims to have been elected to office, and that he is entitled to hold the same until the expiration of the term prescribed therein. Such claim has no legal foundation, so far as it affects this

application.

If he had been in possession of a constitutional office on January 1, 1870 (the day when the amended judiciary article of 1867 took effect), he would have had a legal right to hold the same until the expiration of the term thereof (People v. Gardner, 45 N. Y., 812).

But the office in question being a local and inferior one, was (by section 14, article 6 of the Constitution of 1846), subject to legislative control and action. The only constitutional restriction imposed upon such action was that said office, while it existed, should be elective.

The legislature had the power to abolish the same, or abridge the tenure thereof (People v. Morrell, 21 Wend., 562; Sill v. Village of Corning, 15 N. Y., 297; Brandon v. Avery, 22 Id., 469).

The amended judiciary article 6 of 1867 provides (section 18) that "all other judicial officers in cities, whose election or appointment is not otherwise provided for in (that) article, shall be chosen by the electors of cities, or appointed by some local authorities thereof."

Under this provision the said act of May 17, 1873, was passed, abridging plaintiff's term of office, and conferring the powers and duties thereof upon the officer or officers named in said act.

The act last mentioned repeals the acts of March 30, 1848, and April 28, 1869, by implication. The one is inconsistent with the others. The plaintiff is stripped of all power and authority as a magistrate, and the intention of the legislature that his duties and functions should cease by the time specified, is clear and unequivocal (Harrington v. Trustees of Rochester, 10 Wend., 551; Brown v. Osborne, 2 Cow., 457; People v. Deming, 1 Hilt., 274; 1 Kent Com., 524).

It would thus appear that the equities of the case are strongly in defendant's favor, and that they are entitled to a dissolution of the injunction.

The cases cited by plaintiff's counsel do not authorize his application. In re Baker, 11 How. Pr., 430; In re Whiting, 2 Barb., 518; Welch v. Cook, 7 How. Pr., 178; People v. Allen, 42 Barb., 203; Conover's Case, 5 Abb. Pr., 74, were cases in which proceedings were taken under the statute to compel the delivery of books and papers by a de facto to a de jure officer. None of these authorities sustain the proposition so ably contended for, that injunctive process should be issued to restrain a party from taking possession of the books and papers of an office, under a color of title thereto. On the contrary, the opposite theory prevails, that title to an office can only be tried in a proceeding in the nature of a quo warranto (People v. Stevens, 5 Hill, 616; People v. Mattier; Hart v. Harvey, 32

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Barb., 64; Mott v. Connolly, 50 Id., 516; People v. Cook, 8 N. Y. [4 Seld.], 70; Mayor v. Conover, 5 Abb. Pr., 171; People v. Stevens, 2 Abb. Pr. N. S., 353; Hall v. Luther, 13 Wend. 491; Smith v. Mayor, 1 Daly, 219).

It is also contended that the act of May 17, 1873, is in violation of section 16, article 3, of the Constitution, and therefore void. That it is a local bill, and embraces more than one subject not expressed in its title.

I do not think it is open to this criticism. Each of its provisions has a natural and necessary connection with the proposed plan of administration of the courts in question, and the subjects referred to therein are germane, and fully expressed in its title (Conover v. Mayor, 5 N. Y. [1 Seld., 294; In re Wakker, 3 Barb., 162).

The injunction should be dissolved.*

KLINCK against KELLY.

Supreme Court, First District; Special Term, 1873.

DOUBLE COSTS.

Double costs, when allowed under the statute, are computed on the whole taxed bill, including disbursements.

In this action, which was brought by Seth H. Klinck against John Kelly, sheriff, &c., the clerk, on adjusting defendant's costs, after a verdict in his favor, allowed to him, as "double costs," one-half the whole

^{*} No appeal was taken, but the action was discontinued.

Klinck v. Kelly.

taxed bill of costs and disbursements. There having been a new trial ordered in the action, the clerk allowed to defendant five circuit term fees, after the order for a new trial, in addition to five like term fees before the first trial.

Plaintiff appealed to the special term from this adjustment.

Orlando L. Stewart, for plaintiff,—Argued that the provisions of 3 Rev Stat., 908, § 4, in connection with the provisions of the Code as to costs, limited the allowance of double costs to the items designated as costs in the Code. Also, that under § 307 of the Code, no more than five term fees could be allowed.

J. R. Cuming, for defendant, the sheriff,—Cited as to double costs, Code, § 303 (allowing certain sums "termed costs," but not enacting that any item previously denominated or treated as costs, should cease so to be), Roys v. Willet [MS. Opinion Bosworth, J., 1861]; "Jackson v. Lynch, Superior Court, 32 How.

^{*} In Roys v. Willet, which was an action against the sheriff, in which he prevailed, the clerk taxed the whole bill of costs and disbursements, and to the gross sum added one-half as double costs, and the plaintiff appealed to the court.

The portion of the opinion (by Bosworth, J.) relating to this point was as follows:

Fourth: As to double costs.

Bartle v. Gilman, 18 N. Y., 260, determines that the provisions of the Revised Statutes giving double costs to public officers (2 Rev. Stat., 617, § 24), is not repealed by the Code.

Not being repealed, that law prescribes what items are to be computed in fixing the sum to be paid as double costs.

Sections 24 and 25 (2 Rev. Stat., 617), show what is meant by double costs. They consist (first) of the whole sum included in a bill of costs, and taxed as costs, and (second) of one-half that sum, in addition to the ordinary or single bill of taxed costs (Patchin v. Parkhurst, 9 Wend., 443; Stainland v. Ludlum, 8 B. & C., 889).

The Code, §§ 258, 303, abolished all laws regulating "the costs or

Pr., 93; Code, § 471; Bartle v. Gilman, 18 N. Y., 262, 264, 265; Chadwick v. Brother, 4 How. Pr., 284; 3 Rev. Stat., 909, § 5.

FANCHER, J.—Where a sheriff succeeds in his defense, he is entitled to "double" costs, including disbursements; that is, to the adjusted bill of costs and disbursements, fifty per cent. more must be added. The statute as to double costs is not affected by the Code.

Subdivision 7 of section 307 of the Code allows but five term fees, and no more. All above that number must be stricken from the bill.

DAY against STONE.

New York Common Pleas; General Term, 1873.

Parties. — Executors and Administrators. — Individual and Representative Capacity.—

Joinder of Actions.

In the complaint in an action against the administrator of a deceased agent, to compel an accounting, &c., the plaintiff may ask judgment against the administrator individually for the payment of moneys.

fees of attorneys, solicitors and counsel in civil actions," and in lieu thereof gave to the prevailing party certain sums by way of indemnity; which sums or allowance it denominates costs. But it does not interfere with the rates of compensation to witnesses or jurors, nor enact that any item previously denominated or treated as costs, and still taxed in favor of the prevailing party, shall cease to be so denominated or regarded.

The principle on which the clerk acted in doubling the costs, is the true one.

and the delivery of books and specific property, belonging to plaintiff, which came to the deceased as such agent, and which the defendant has possession of and refuses to deliver.*

This is not joining two causes of action.

Austin G. Day sued Harriet A. Stone individually and as administratrix.

The complaint alleged, that plaintiff had been engaged in the business of manufacturing and selling certain goods; that he employed Israel Stone, as his agent, at a monthly salary, and on going abroad he gave Stone a power of attorney to sign and indorse checks for him. That Stone continued in his employ as such agent for about two years, when he died; and that while so employed Stone had no other income and no other property but his salary, except a little furniture. That as plaintiff's agent he had received about ninety thousand dollars which he had never accounted for: and (on information and belief) there were in his hands at his death about thirty-five thousand dollars of plaintiff's money. That he had on deposit in bank in his own name over twelve thousand dollars of plaintiff's money, on which neither he nor his estate had any claim. That in addition thereto he had as such

^{*}In a common law action against an executor or administrator the plaintiff cannot join, with causes of action against the representative in his capacity as such, demands against him individually; and this rule has been extended to exclude demands arising in respect of the estate, if such as render the executor solely liable in the first instance (Ferrin v. Myrick, 41 N. Y., 315; Austin v. Munroe, 47 Id., 360, affirming 4 Lans., 67. But see Tradesmen's Bank v. McFeeby, 61 Barb., 522).

This principle, however, cannot properly be applied to preclude a court of equity from settling all the claims of a creditor of the estate, both in respect of the assets in the hands of the representative, and in respect of property of the plaintiff which came to the hands of the representative from the decedent. The fact that the judgment may be partly against the assets and partly against the defendant individually is no objection; for this may be the result in any action against a trustee where he has made himself personally liable.

agent certain stock of a corporation (fully described) standing in his name, but belonging to plaintiff. That the surrogate issued letters to defendant as the administratrix of Stone, and that she thereby had drawn the moneys out of bank and had obtained possession of the certificate of stock and all the papers and books of the business, and had removed them to some place unknown, and had refused on demand to return them. That she is irresponsible; and drew the moneys from the bank knowing that she had no right to them.

That before bringing this action, plaintiff had demanded of her as administratrix the moneys, books, &c., and duly offered to refer the claim, but she refused to comply. That many of the aforesaid acts she claimed to do in her individual capacity. That the surrogate had not ample jurisdiction to settle the controversy, and plaintiff had no adequate remedy at law.

Wherefore he asked judgment, 1. For an injunction. 2. For payment of the bank deposit. 3. For repayment of advances made by plaintiff, to be ascertained by an acounting. 4. For a delivery and transfer of the stock. 5. For a surrender of the plaintiff's books and papers. 6. For an accounting and payment of moneys due from the intestate to plaintiff; and, 7. For general relief.

Defendant demurred for misjoinder of a cause of action against her individually, and a cause of action against her as administratrix.

Robinson, J.—If I had any doubt on the question presented, which I have not, the case of Christy v. Libby, in 5 Abb. Pr. N. S., 192 controls. Demurrer overruled, with leave to answer on usual terms.

Defendant appealed.

W. McDermot, for defendant, appellant.—I. The complaint sets out two separate causes of action; one

against the defendant, as administratrix, and one against the defendant personally. 1. As to the cause of action against the defendant as administratrix: The complaint alleges that plaintiff remitted to Israel Stone. in his lifetime, about ten thousand dollars in cash, and that said Israel Stone received about eighty thousand dollars, and that at the time of his death there was thirty-five thousand dollars unexpended in his hands. The complaint does not state that this money ever came into defendant's possession; therefore the claim against her for that amount must be against her as administratrix, and not individually. The complaint also alleges a presentation to the defendant, as administratrix, of a claim for the money due from the intestate at the time of his death, and demands judgment against the defendant, as administratrix, for thirtyfive thousand dollars. 2. As to the cause of action against the defendant individually: The complaint alleges that the defendant has become possessed of twelve thousand one hundred and eighty-eight dollars and fifteen cents, and of certain books and papers belonging to plaintiff, and demands judgment against her, individually, for the twelve thousand one hundred and eighty-eight dollars and fifteen cents, and for possession of the books. The plaintiff claims this to be an equitable action against the defendant to recover money and property belonging to him, which have come into possession of defendant, but the answer to this is, that the complaint alleges a cause of action for money, which did not come into defendant's possession, but for which he demands judgment against the estate of Israel Stone. In an action against the defendant to recover money or property belonging to plaintiff, which came into her possession, it was not necessary to make her, as administratrix, a party. If she claimed to hold the money and property as administratrix, she 'would have to set up such claim in her answer. It is

improper to join in one complaint prayers for relief against the defendant individually, and in his capacity as executor (McMahon v. Allen, 1 Hilt., 103. Lucas v. New York Central R. R. Co., 21 Barb., 245; Warth v. Radde, 18 Abb. Pr., 396; Wiltsie v. Beardsley, Hill. & D., 186). By section 167 of the Code, subdivision 7, several causes of action may be united against a trustee, by virtue of a contract or by operation of law.

Amos G. Hull, for plaintiff, respondent.-I. The complaint is authorized by section 167 of the Code. Legal and equitable relief may be adjudged under one complaint (Phillips v. Gorham, 17 N. Y., 274). The burden of this complaint is against the defendant for taking the property and all muniments of title, and appropriating it to her own use, knowing it to be plaintiff's. She admits that knowledge by the demurrer. Now, if an answer should be put in, how many acts in this drama she will claim, on the trial to have done in her individual capacity, and how many in her capacity as administratrix, it is impossible to determine until a trial shall be had. Should we sue her as administratrix alone, she might answer: here is the property, this is all that has come into my possession as administratrix, a few hundred dollars. We ask for the books, papers, documents, and other moneys that came into her hands from this deceased agent of ours, and she replies they are mine, they were transferred to me individually; the estate has nothing to do with them. We could not go beyond the scope of our complaint in examining her, and the ends of justice would be defeated. Hence we make our complaint broad enough to examine her individually, and ask relief against her individually, as well as against her as administratrix. But suppose we had sued her individually, she would have had a right to come in and say that the estate should be joined. She no doubt would say the plaintiff's agent has died

without having accounted, and I, his administratrix, have taken possession of all the effects found in the possession of the intestate. Perhaps some of this property is the plaintiff's, and some belongs to the estate of the agent. I am unable to distinguish his from the plaintiff's. Let the plaintiff make the estate also a party, and then I shall be in a position to answer. This she would have a right to say, as we contend. That proposition being conceded, and the demurrer cannot be sustained. Again, suppose "A" dies without children, leaving a widow and real estate and a will devising certain personal property to the widow on condition that she releases her dower in the real estate; the balance, including the real estate, is devised to a nephew in trust, and the widow is appointed executrix and trustee under the will. She executes the release of dower and delivers it, but before it is recorded she borrows the release under some plausible pretext, and refuses to return it. She commences squandering the trust estate and committing waste on the real estate. The period has arrived in which the cestui que trust is entitled to the estate. He files his bill in equity to restrain the widow from committing waste, and for an accounting; and in the same bill he asks a decree that the widow be directed to return the release of dower, to the end that it might be recorded and the cloud removed from the title to the estate. Would any good lawyer contend that such a bill would be obnoxious to the charge of multifariousness? I think not. If such a bill could be maintained, much more can this. Such a bill has been maintained. Every particle of relief we ask grows out of one transaction, namely, the agency of the deceased, in having the custody and control of the plaintiff's property while abroad, and the defendant's sales, and illegal interference therewith by the defendant under the claim of being administratrix of the estate. As bearing on

the question, although not precisely in point, I cite Newland v. Champion, 1 Ves., 106; Doran v. Simpson, 4 Id., 651; Beufuld v. Saloman, 9 Id., 86.

II. This question has been substantially adjudged at a general term of this court (Christy v. Libby, 5

Abb. Pr. N. S., 192.)

BY THE COURT.-J. F. DALY, J.-There is but one cause of action stated in the complaint. It is against the administratrix of the plaintiff's deceased agent, and it is brought to obtain an accounting to obtain certain stock, books and papers, the property of plaintiff, judgment for the amount found due plaintiff on the accounting, and to recover the sum of twelve thousand one hundred and eighty-eight dollars and fifteen cents, money of plaintiff deposited by deceased, in his bank, and which with the above property and other moneys have been taken by the administratrix. She is made a defendant individually, because she claims some interest in the subject matter of the action, -i. e., claims to have acted individually in taking possession of certain of the property,—and as this action is equitable in its nature it is proper that the rights and claims should be settled in it. This complaint is less open to criticism than that in Christy v. Libby (5 Abb. Pr. N. S., 192), sustained by the general term of this court on appeal from an order overruling a demurrer to it.

The particular point discussed on the argument in the case is not treated in the opinion of that general term; but one of the grounds of demurrer there, was that two causes of action had been improperly joined, one against the defendant as collector for an accounting, and the other against him individually for neglect and mismanagement of the estate of which he was collector.

The case at bar differs from McMahon v. Allen (1 Hilt., 103); Worth v. Radde (18 Abb. Pr., 396), and

Wiltsie v. Beardsley (H. & D. Sup., 186), because there are not two causes of action set forth in the complaint. Any bill in equity might be the subject of demurrer where several claimants to a fund are joined as defendants to obtain judicial determination of their rights if the demurrer here could be maintained.

CHARLES P. DALY, Ch. J., and LOEW, J., concurred.

Order appealed from affirmed.

BURROUGHS against GARRISON.

New York Common Pleas; Special Term, May, 1873.

TAKING INQUEST.

Under an order of the court extending the defendant's time to answer, on condition that he signed a stipulation to take short notice of trial, and that the date of issue should be of the date when the answer was originally due, a stipulation to that effect was made, and defendant accepted notice of trial, and the cause was placed on the calendar before the answer was served. After the commencement of the term the answer was served, but no affidavit of merits was filed, and plaintiff took an inquest and entered judgment. Held, that the judgment was regularly entered.

Motion to set aside judgment and inquest.

The facts are stated in the opinion.

J. F. Daly, J.—The defendant's time to answer was extended, by order of the court, to April 9, 1873. On March 25, 1873, plaintiff moved on notice to vacate that order. The court denied the motion, upon defendant's attorney signing a stipulation "that defendant

should take short notice of trial for April term, and date of issue be when answer was originally due, being on February 28." Such stipulation was made on said March 25, and pursuant thereto plaintiff served a notice of trial for the first Monday of April, 1873, and defendant admitted due service. Plaintiff filed a note of issue in due time, and the cause was placed on the calendar for the April term. The term commenced on Monday, April 7. On April 9 defendant served his answer, but neglected to file and serve an affidavit of merits. On April 14 plaintiff came into court and took the inquest. The defendant now moves to set the inquest aside, for the following alleged irregularities: 1st. Because the cause was not properly on the calendar of the April term, the issue not being joined until after the term commenced, the notice of trial being served before issue joined. 2nd. Because defendant had, as matter of right, twenty days to amend his answer after serving it, and the inquest was taken before that time had expired. 3rd. Because his answer contained a counter-claim, to which defendant had not replied to nor demurred to, and which was wholly disregarded in giving him judgment. The defendant also asks leave to come in and try the issues on the merits.

As to the alleged irregularities, I am clearly of opinion that the plaintiff's practice was regular. First. The cause was properly on the April calendar. The object of requiring defendant to accept short notice of trial for April (which he did, and admitted due service under his stipulation), was to give plaintiff the benefit of that term. If he were to have the benefit for any purpose, he was to have it for every purpose; one being the right to try the case that term, if he had the opportunity. If he did not gain the right for that term, he could not make that notice of trial available for any subsequent term; and in order to bring on his

case at any time, he would have to give a new notice. This would in effect be to consider the notice given for April wholly void and of no effect; but this would be to hold the defendant's stipulation to take such notice of no effect, and finally to make the condition imposed on him by the court on granting him an extension of time to answer of no value; which latter should not be permitted unless inevitable, which it is not. There was of course no issue joined when the notice was given, but the defendant by his stipulation agreed to receive it as if there were an issue, and cannot now raise the objection. The cause could not be tried until there was an issue to try: but as soon as there was one joined the trial could be had. If a trial could be had, an inquest could be taken in a proper case; i. e., where no affidavit of merits was filed and served.

Second. The objection that defendant's twenty days to amend his answer had not expired when the inquest was taken, is not good. Neither the plaintiff nor the court is bound to anticipate an amendment of his answer by the defendant, nor to wait for it. If his cause be reached for trial before the twenty days is out, he must amend at once, or his right is gone. In this case he could have kept his time open by filing his affidavit of merits.

Third. The alleged counter-claim in the answer was properly disregarded, and judgment given for plaintiff for the full amount claimed in the complaint. The facts stated in the answer did not constitute a counter-claim, because it was not one existing "in favor of a defendant" in the action, but in favor of a third party. The suit was brought against the guarantor of the bonds, and his principal was not joined with him as defendant. The counter-claim was a cause of action in favor of the principal only, who was not a defendant. The cases cited by defendant (Newell v. Solomons, 22 Barb., 647, and Parsons v. Nash, 8 How. Pr., 454).

therefore, do not apply. Neither was the counter-claim connected with the subject of the action. It was an action for moneys had and received by plaintiff belonging to, or the benefit of which ought to be received by, the maker of the bond which the defendant had guaranteed. Had the maker been a party to the action, he could have recovered, and his recovery would have enured to the benefit of his guarantor (see cases cited above); but the plaintiff sought no judgment against the maker, and did not make him a party. The plaintiff was not bound to reply to the counter-claim, nor to demur to it, but might, as he did, on the trial make the objection that the answer did not set forth facts sufficient to constitute a counter-claim as against him (Van Valen v. Lapham, 13 How. Pr., 243; 5 Duer, 689; Boyce v. Brown, 7 Barb., 81). The case of Fettretch v. McKay, 11 Abb. Pr. N. S., 453; S. C., 47 N. Y., 426, does not overrule those decisions; it only holds that a counter-claim cannot be stricken out as irrelevant, on motion before trial, and decides in effect that if the plaintiff wishes to dispose of it before the trial of the other issues, he must demur to it, or move to make it more definite.

There do not appear to be any merits in the answer, the affidavits read on the motion disposing of that ground of the application.

The motion must be denied.

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Matter of Washington Park.

MATTER OF WASHINGTON PARK.

Supreme Court, Third District; Special Term, August, 1873.

EMINENT DOMAIN.—DISCONTINUANCE OF PROCEED-INGS TO ACQUIRE LANDS.—VESTED RIGHT.

In proceedings to acquire lands for public use under a statute allowing this to be done in invitum on making compensation,—an adjudication of the necessity or propriety of taking certain lands determines the right of the respective parties (subject to the further proceedings to fix the compensation), and after such adjudication the applicants cannot discontinue, nor should the court permit them to discontinue without the consent of the land owners.

In the matter of the extension of the Washington Park of the city of Albany.

S. W. Rosendale, for the park commissioners.

Colvin, Barnes, & Morrow, opposed.

LEARNED, J.—This is a motion founded on a petition of the board of commissioners of Washington Park, asking leave to vacate, set aside and abandon certain proceedings commenced by them and now pending in this court, and especially the order appointing commissioners of appraisal, and also to withdraw the petition on which that order was granted. It was argued as being substantially a motion for leave to discontinue. The owners of certain property who had been served with a copy of this petition and notice of its presentation, now appear and oppose.

The facts are as follows: About May 12, 1873, these owners were served with a copy of a petition on behalf of the board of commissioners of Washington Park,

and notice of its presentation. This petition, after setting forth the organization of the board under a certain act, stated that at a meeting of said board duly convened and organized, said board, by a vote of twothirds of all the members, taken by yeas and nays, and duly entered on the minutes, deem it necessary to purchase or take certain land therein described, belonging to these owners severally, for the purpose of laying out, &c., said park; that they were unable to agree with the owners as to the price; that it was their intention, in good faith, to acquire title to said real estate; that in their judgment it was acquired for the purpose aforesaid; that they had authority to take the land; that a map of the land had been made by the city surveyor as a part of the proceedings, and had been filed in the clerk's office. On May 27, 1873, the day when the petition was to be presented, the said board of commissioners appeared in court, and the owners appeared. Thereupon, an order was then made by this court appointing commissioners of appraisal.

The commissioners of appraisal afterwards, at the appointed time, met and proceeded to appraise the property. The park commissioners and the owners appeared before them; witnesses were sworn, and the matter was proceeded with from time to time. The case of each several owner was taken up successively and determined. The commissioners of appraisal announced and made their determination in each case, the last having been made July 22, 1873, and nothing remained for them to do but the formal drawing up and filing of their report; and they adjourned sine die, except for that purpose.

On July 28, when the commissioners of appraisal were ready to make and file their report, the park commissioners, upon the petition which is now before the court, obtained an *ex parte* order staying the commissioners of appraisal from filing their report and staying

the owners from taking any proceedings. This has been modified so as to permit the owners now to move for the filing of the report and for the confirmation thereof.

The petition states that the board of park commissioners, at a meeting on July 28, 1873, by a vote of two-thirds, taken by yeas and nays, and entered on the minutes, resolved that it was necessary to vacate, set aside and abandon, these proceedings, and to ask an order to that effect on the ground, among others, that the awards were excessive, and that lands could be acquired elsewhere more economically.

A certified copy of the ressolution at that meeting was read on the hearing. From this it appears that a report was made to the meeting stating the amount of each award, and that the vote of the park commissioners was simply that the awards be rejected, and that the attorney of the board take all necessary steps for closing and discontinuing said proceedings. There does not appear to have been any vote that the awards were excessive, or that lands could be obtained elsewhere.

From the vote to reject awards, they would seem to be considered simply as proposals on the part of the owners which were to be accepted or rejected as should be thought best by the commissioners.

First. It is not claimed by the petitioners that this is the mode to review the awards. The remedy, if the awards are excessive, is by confirmation and appeal. The alleged excessiveness of the award is not mentioned in the vote, and, at any rate, it is now only suggested as the motive which influenced the board. It is not pretended that there is any evidence now before the court that the awards are excessive. The report itself would need to be on file before the question, whether or not its awards were excessive, could be raised. But the position of the board of commissioners is that they

have the absolute right to discontinue these proceedings, and that in fact, the present application is rather out of respect to the court, than from strict necessity.

Second. Notice, however, of this motion has been given to the owners, and they appear to oppose. The ultimate decision, therefore, will be binding on the

parties, hence, it becomes very important.

Third. It is argued by the petitioners that the plaintiff in an action, or the petitioner in special proceedings may (generally at least) discontinue. Why may not they in this case? Now, this marked distinction is to be observed. In most cases, actions and special proceedings are for the enforcement of some contract previously existing, or for the redress of some wrong previously done. But in these proceedings there is, at some point, in their progress, a new right created between parties, that is, the right of compulsory purchase of certain definite property. Now, whenever that right is created, it would seem that, then, both parties must be bound by it.

Fourth. When, then, is this right created, that is, the right of the park commissioners to obtain these specified lands of these owners. Now, if A and B make a contract, by which A is to sell to B certain lands, their rights are then fixed. It is true that A may not be obliged to convey to B until B shall have paid him the price. But the *contract* is binding on both, and must be binding on both, or on neither.

It is sometimes said that proceedings like these create a statutory contract. That expression is not to be taken literally, but by way of analogy; because a contract implies the agreement of two parties which does not exist here. Yet there must be something in the nature of a contract by compliance with which, that is, by payment of the money, the title passes to the commissioners.

It is the right of the State to apply to public use

any property within its control, whenever such property is necessary for public use.

That right the State in certain cases confers on others, who are in some sense acting for the public good. But there must always be some authority to decide that the property is necessary for public purposes. In some cases the State decides the question. In other cases it puts the decision in other hands. But evidently that decision must somewhere be made.

Then when it has been decided that certain property is necessary for public purposes, the constitution interferes and says that the property shall not be taken without making compensation. It then remains to

ascertain what is the proper compensation for the property which it has thus been decided is necessary

for public purposes.

There are, then, in every such proceeding two things. First, a decision by some authority clothed with that right, that the property is necessary for public purposes. Next, when that has been settled, an ascertaining of what compensation shall be paid. The two are distinct, although they may be vested in the same body.

Now, in the case of railroads (and the park commissioners' authority is through the same act), it is not the right of the company to decide that certain specified lands are necessary. The company is to apply to the court, upon notice to the owner. The court is to hear evidence and decide the question; and an appeal lies to the highest court from that decision; for that decision is the vital matter in the whole proceeding. It is that which determines whether or not, in the case proposed, the taking of the lands in question by the applicant is necessary for public purposes. That decision, when finally determined, is conclusive on the owner of the land. It must on all sound principles be conclusive on the applicant. The applicant has brought

the owner into court on an allegation, in substance, that it is necessary for the public purposes, managed by the applicant, that this property of the owner should be taken; and the court has decided this in the applicant's favor. That question is ended. The remainder of the proceedings is only to determine what is the value of the property. But the decision has settled that the owner shall have the value, and the applicant shall have the land. "The decision of the special term was a fixed adjudication of the right of the respondent to a condemnation of the lands under the statute. The subsequent proceedings relate only to the assessment of damages, and the review by the court of the action of the commissioners." (Rensselaer and Saratoga R. R. Co. n. Davis, 43 N. Y., 137).

In the present case, the petition presented to the court as the basis of these proceedings, stated that the park commissioners deemed it necessary to purchase or take these specific parcels of ground for the purposes of the park; that in good faith they intended to acquire title thereto; and that these parcels of ground were required for these purposes. If it had appeared that these parcels were not necessary, or were not required; if, for instance, it had appeared that these parcels were not in the neighborhood of the park, and could not be used for the purposes of the park, the court would undoubtedly have decided against the application. On the contrary, it was decided that these parcels were necessary and were required. Such a decision was necessarily involved in going to appoint commissioners of appraisal.

Suppose that the petition had stated that the lands were necessary for park purposes, provided the commissioners should be satisfied with the amount to be awarded by the appraisers; could the court have granted the order? Clearly not; for the necessity of taking the lands was to be determined at that time.

It was not to depend on the subsequent election of the owners or of the commissioners.

It appears to me, then, that the order of May 29, 1873, determined the rights of the respective parties; the park commissioners to a quasi purchase, and the owners to a quasi sale of these parcels of land, at the value thereof to be determined in a mode specified by law.

This question has been discussed in English courts, and the principle above stated has been there affirmed in the strongest manner. It is to be noticed that in similar proceedings in England, the party (usually a railroad company) desiring to acquire title gives notice to the owner that such lands are required, and that if within a certain time the owner does not treat, or if the parties cannot agree, then that the company will proceed to have the value ascertained by a jury. This ascertaining of value by a jury seems to be done by the issuing of the company's warrant to the sheriff or summoning officer.

In the case of King v. Hungerford Market Co., 4 Barn. & A., 327, the company gave the notice, and afterwards neglected and refused to issue their warrant. A motion was made for a mandamus to compel them to issue their warrant. And it was granted. Denman, Ch. J., said: "If they are not bound by their notice, then it follows that after giving it they are free during the long term of three years to take the property or not, at their discretion; and the owner is at their mercy during that time." Parker, J., said: "The notice ought to be as binding on them as on the owner."

In Stone v. Commercial R. Co., 4 Mylne & C., 122, the court said: "The moment that the company have given the notice, the relative situation of vendors and purchasers is so instituted between the parties, and the value of the property, if the parties cannot agree, is to be ascertained by reference to a jury."

In Tawney v. Lynn & Ely R. Co., Law Journal

Rep. N. S., vol. 16, p. 282, a company gave notice that they should require twenty perches of plaintiff's land. Subsequently they gave notice that they should require only one perch, and countermanded the former notice. It was held that the first notice was binding and could not be withdrawn, and the company were enjoined from proceeding under the second.

A still stronger case is that of Walker v. Eastern Counties R. Co., 6 Hare, 594. In that case the company gave the usual notice to the owner, and afterwards wrote to him that they did not need the land. He brought an action for specific performance. It was said by Vice-Chancellor WIGRAM: "The notice had the effect of making a contract between them for the purchase of the plaintiff's houses. It is clear that the company could not, after that notice, have retired from it. After that notice the only thing to be ascertained was the amount of the purchase money; and as the mode of ascertaining that is prescribed by statute, it is in contemplation of law certain, although it remains to be ascertained. . . . The contract is a contract to purchase on the terms prescribed by the act of parliament, and those terms the court has the means of ascertaining, so as to get at the price." Specific performance was decreed.

These decisions appear to me to be sound and just. On the other side, it is urged that the payment of the value of the land must be made before the owner can be divested of his title.

There is no occasion to dispute that principle. Whenever a contract for the sale of lands is made, the purchaser must pay the consideration before he obtains his deed, yet the contract is binding before it has been fulfilled.

But the question here is, when is that quasi contract established between the parties, which enables the commissioners on payment of the price to procure the title.

In England we see it is the giving of that notice, because under the system in that country it is not required that any court should decide on the necessity of taking the land. But it would be an outrage on the rights of property, if, in the exercise of this right of eminent domain, the commissioners having obtained a decision that this property was needed, to which decision the owner was obliged to submit; having thus placed him in the position of a man who had contracted to sell his property, should then, even after the value had been determined, have the right to break off the bargain.

The case of Baltimore & Indianapolis Railroad Company v. Nesbit, 10 How. U. S., 395, is not in conflict with these views. The decision there was that the legislature might direct the court to set aside the inquisition, and direct an inquisition de novo. That was merely the having a new assessment of damages. It did not disturb the quasi contract that the railroad company should take, and the owner should sell the lands. It is important to notice in that case also, that after the inquisition had been made the railroad company did not offer the money to the owner for the space of seven years, nor until after the legislature had directed the court to set aside the inquisition and to issue a new one. Then the company claimed the right to avail themselves of the old inquisition. Their own delay had been a virtual waiver on their part of the inquisition, and it was too late for the company now to insist on its validity. In our own railroad law the report of the commissioners may be appealed from and a new award had. So, in the Matter of Widening Broadway, 61 Barb., 483; affirmed in court of appeals, 49 N. Y., 150, it was held that the legislature might authorize the court to open an award for fraud, and to have a new award made; for the appointment of commissioners of appraisal is merely to ascertain the value of the land, not to decide whether it shall be taken

I am referred to a case in this district, not reported, and in which I have seen no opinion. Judging from the brief of counsel, the award was fraudulent. The court refused to confirm it.

There is another point which is not without weight, although I do not deem it necessary to pass upon it. That is, that there is nothing in the act which expressly authorizes the park commissioners to change the lines of the park after having once decided upon them, section 23 of the railroad act not being made applicable to the park commissioners.

When parties are endeavoring to make a bargain, it is very proper for one to make a proposal, and to give the other an opportunity to accept or reject. But that is not the nature of this present proceeding. The award is not a proposal on the part of the owners, any more than it is a proposal on the part of the park commissioners. The owners could not vote to reject the awards; why should the park commissioners have that privilege? The very ground on which the proceeding is initiated is that the parties cannot agree; and the object of appointing appraisers is to fix a sum on which the parties must agree.

When the court had decided that it was necessary to take this property, the owners had a right to depend on the decision. Practically they were prevented, after that decision, from making any sales, from leasing or improving. They were bound as effectually as if they had entered into a written contract for a future conveyance to the park commissioners. Indeed they were bound more effectually, because any purchaser takes subject to these proceedings. In justice and in good faith, therefore, the obligation should be mutual. The exercise of the right of eminent domain is harsh at the best. No unnecessary injustice should be added.

The motion for leave to abandon the proceedings

Livingstone v. Arnoux.

and to set aside the order of May 27, 1873, and to withdraw the petition then filed, is denied.

The motion on the part of the owners to confirm the report cannot be regularly heard until the report shall be filed. It must, therefore, be denied, with leave to renew; or it may stand over to some day when the report shall have been filed.

LIVINGSTONE against ARNOUX.

New York Common Pleas; General Term, June, 1873.

REDEMPTION OF LAND FROM SALE UNDER EXECUTION.

The former court of chancery, in a suit in the nature of a creditor's bill (as authorized by 2 Rev. Stat., 174, § 39), acquired no power over the debtor's land; and the fact that the debtor in such a suit, by order of the court, assigned to a receiver all his real estate, did not deprive him of the power to redeem such real estate from a sale on execution against him.

It seems, that the right of the debtor to redeem is independent of whether he retains any interest in the land.

The receipt or certificate of the sheriff who made the sale is sufficient evidence of the payment of the redemption money, and establishes the complete redemption of the property from the sale under the execution.

The provisions of the act of 1817 (2 Laws of 1847, p. 503, ch. 410), apply only to redemptions made by creditors of the debtor, and not by the debtor himself.

Appeal by the defendant from a judgment entered on the verdict of a jury.

This was an action of ejectment to recover lands lying in the city of New York, which the defendant

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claimed to hold by virtue of a sheriff's sale upon an execution against one Price, under whom the plaintiff claimed. The facts of the case were, that a judgment against Price was docketed on March 9, 1846, and on April 13, 1848, his interest in the land was sold by Westervelt, the then sheriff of the city and county of New York, under execution thereon, for twelve dollars and fifty cents, to Charles O. Richardson. The usual certificate of sale was issued by the sheriff, and filed April 20, 1848. In November, 1866, Richardson assigned his bid and certificate to Isaac B. Findell, who received from John Kelly, then sheriff of the city and county of New York, a deed of the land, dated October 19, 1867; and by various intermediate conveyances the land came to the defendant.

On September 10, 1847 (after the docketing of the aforesaid judgment against him, but before the sale under the execution issued thereon), Price, pursuant to an order of the late court of chancery, made in a suit brought against him by Thaddeus B. Wakeman and Ebenezer Seeley, in the nature of a creditor's bill, to collect a judgment of one hundred and ninety-nine dollars and twelve cents, conveyed all his estate in the lands in question to John J. Latting, who had been appointed receiver in that suit.

On February 28, 1848, Price paid to the receiver six hundred and twelve dollars and fifty cents, in full of the amount of the decree, interest, costs, &c., in the chancery suit, except the costs on a warrant of commitment, and by deed dated August 13, 1850, the receiver reconveyed the lands to Price.

On April 10, 1849, and within one year from the sheriff's sale, Price redeemed the land from the sheriff's sale, and took from the sheriff a certificate to that effect, but did not file or record it.

At the time of the trial Price was dead, as was also Westervelt, the sheriff, who gave the receipt, but the

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receipt was proved to be in his handwriting; and at the foot of the receipt was a memorandum proved to be in the handwriting of Isaac Adriance (then dead), who had been the attorney for Price, in the following form: "I asked Mr. Westervelt whether that amount was all that was necessary to redeem all the property sold by virtue of the execution. He answered that it was, as I told him I wanted to redeem all that was sold. 10 April, 1849. I. Adriance. I paid the sheriff the above money, and took the above receipt for F. Price."

The admission of this certificate was objected to, but it was admitted, and an exception taken. At the close of the trial, the defendant moved to dismiss the complaint on the following grounds:

1. That no redemption had been proven.

2. That no payment by Price or Adriance at the time testified to could work a redemption, nor would prevail against the title of the defendant, who was a bona fide purchaser for value, without notice of the alleged redemption.

The motion was denied, and an exception taken.

The court charged that if the jury believed that payment was made to the sheriff as stated in the certificate, they should find for the plaintiff. Plaintiff had a verdict.

Wm. Henry Arnoux, appellant, in person.

Samuel Riker and John E. Parsons, for respondent.

BY THE COURT.*-ROBINSON, J.-The material questions upon this appeal and upon the same title now in question, have already been passed upon, by the superior court, + at general term, in May, 1871, in the case of Henry Bowen v. this same defendant, and in

^{*} Present, DALY, Ch. J., ROBINSON and LOEW, JJ.

[†] See the case reported in 1 Jones & Spencer, 530.

the supreme court at special term, by Judge FANCHER, in the case of Ellsworth v. Muldoon.* In the general reasoning of these courts in those cases, and in their results, I concur, but venture to add these further considerations, which influence my decision.

1st. That notwithstanding the assignment made by Francis Price, the judgment debtor, to John J. Latting, receiver, dated September 10, 1847, he still had the right of redemption of his real estate, previously sold upon execution on the judgment against him, under which defendant claims title.

The action in which Mr. Latting was so appointed receiver, was not one, in rem, relating to real estate or within the common-law powers of the court of chancery, in which it was pending, having reference to fraudulent trusts or conveyances of real estate or one affecting the title to the land. It was a proceeding in the nature of a creditor's bill, as authorized by the provisions of the revised statutes (2 Rev. Stat., 174), to collect a judgment recovered by Thaddeus B. Wakeman and Ebenezer Seely, for one hundred and ninety-nine dollars and twelve cents, and prior to the sale upon the. execution under which the defendant claims title, the receiver had been fully paid the amount due on that judgment, for debt, interest, and costs, and the only matter of claim by the receiver was for some unpaid costs of a warrant of commitment. How these latter costs had ever been allowed or become any charge upon the assigned estate, is not shown, and for aught that appears the legal purposes of the assignment had been fully satisfied (Selden v. Vermilya, 3 N. Y., 525). The receiver, however, did execute a reconveyance to the judgment debtor, August 13, 1850, but subsequent to a sale made by the sheriff on execution against the judgment debtor on April 20, 1848, of the lands in dispute, under which this defendant claims title

^{*} Reported in this volume

Such an action by creditor's bill, as authorized by the revised statutes (2 Rev. Stat., 174, § 39), is confined to such satisfaction as may be obtained "out of any personal property, money, or things in action belonging to the defendant (the judgment debtor) or held in trust for him, whether the same were originally liable to be taken in execution at law or not." The institution of such an action did not bring the real estate owned by the debtor and situate within the State within the jurisdiction of the court of chancery, and could at most affect it by a sequestration of costs due or (possibly) those to become due. It did not authorize the court, in such an action, to sequestrate the title to the land and vest it in its receiver, or to confer on him any but the powers of a common-law receiver. It could not supersede the necessity for a sale under execution of the debtor's interest in the land, nor deprive him of the right of redemption as afforded by statute (Scouton v. Bender, 3 How. Pr., 185; Chatauque County Bank v. White, 6 Barb., 599-603, unreversed in this respect in 6 N. Y., 252-255; Porter v. Williams, 9 1d., 148).

The act of 1845, chap. 112, enacted that "Any receiver appointed by virtue of an order or decree, may take and hold any real estate upon such trusts and for such purposes as the court may direct, subject to the further order or direction of the court." This act does not profess to extend the general jurisdiction of the court upon proceedings instituted as a mere creditor's bill, that in no way involved its powers in matters of alleged trust or fraud, nor authorize it to sequester or seize upon the debtor's title to real estate. It allowed the imposition only of such trusts as were consonant with the jurisdiction already possessed by the court. And as none existed on such a mere creditor's bill to sell the debtor's real estate, subject to execution, for the payment of the debt, no such trust could be enforced

or directed under the act of 1845. The deed to the receiver of all the debtor's real estate, subject to the present and future orders of the court, without any such further or other order, or any authority in the court to order a sale of this property, or any order or decree made to that effect, in no respect divested Price, the judgment debtor, of any right or interest in the land. It is only in cases where the title to lands within the State is assailed by the creditor for fraud or breach of trust, or for the enforcement of a trust, that the action becomes one in rem, and the title to the real estate becomes involved, that the right attaches, and the court seizes upon it, for the purposes of its ultimate decree, and the title remains in abeyance until the final disposition of the questions raised in respect to it are adjudicated upon and settled by the court.

Second. The statute (2 Rev. Stat., 370, § 46), authorized the redemption of real estate sold under execution. 1st. By the judgment debtor; or, 2nd. (If dead) by his heirs or devisees; or, 3rd. By his grantee, "who shall have procured an absolute title, by deed, sale under mortgage, or by any other means, to the premises sold, or to any lot, tract, parcel or portion that shall have

been separately sold."

The right of redemption thus afforded the judgment debtor seems to be independent of, and from many considerations to extend beyond, the mere circumstance that he yet remains absolute owner of the land. The statute is distributive, and affords the remedy to each class of persons named. As to the judgment creditor, various good reasons for his redeeming the land, growing out of his interest in the question, may still continue to exist, although he may have parted with all his title in the land; to wit, from his covenants of warranty and against incumbrances, or from other considerations of interest or morality that may induce him to protect the title of those claiming

under him. His independent right, under the statute, to effect such redemption, appears to be absolute, and without exception, in terms or in principle, notwith-stauding he may have ceased to be the owner of the property sold. From the considerations above stated, the title vested in Latting, the receiver, as his grantee. Was not such "an absolute title," by deed or otherwise? (2 Rev. Stat., 370, § 46, subd. 3). As upon any aspect of the case it divested the judgment debtor of any interest in the land, or of consequent right of redemption, it was defeasible, and only subject to the payment of the judgment debt and costs.

Thirdly. The receipt or certificate of the sheriff who made the sale, and was by statute authorized to receive the redemption money for the purchaser at thesale under the execution (2 Rev. Stat., 370, § 45), was sufficient evidence, under well-established principles, of such payment, and a complete redemption of the

property from the sale under the execution.

First. The purchaser acquired a mere lien (Vaughn v. Ely, 4 Barb., 159; Hodge v. Gallup, 3 Den., 536); and on payment of the amount necessary to make the redemption, the sale and the certificate thereof became null and void (2 Rev. Stat., 371, § 49).

Second. The payment was well established by such receipt of the person authorized to accept the amount

necessary to effect the redemption.

Third. The agency of Isaac Adriance in making such payment (both he and the sheriff who made the sale being dead), was well established by the cotemporaneous, written memorandum he made in his lifetime, and neither he nor his representatives could contest the fact of his agency. It was, however, otherwise sufficiently proved.

Fourth. The provisions of the act of 1847, ch. 410, amendatory of 2 Rev. Stat., 371, § 51, have reference

only to cases in which the judgment debtor, his heirs, devisees or grantees, have failed to make redemption of his lands sold under execution, as allowed by sections 46 to 48, and to such redemptions, acquisitions and transfers of title as may thereafter and within fifteen months after the sale be acquired by successive judgment creditors or mortgagees, through subsequent redemptions. They have no reference to the absolute redemption to be effected under sections 46 to 49, whereby the property is reinstated, and again subjected to the subsisting liens of other judgments and mortgages than the judgments upon which it had been sold.

This right of redemption is remedial, and is not to be strictly construed. "It is to receive a liberal and benign construction in favor of those whose estates will otherwise be divested" (Dubois v. Hepburn, 10 Pet. 1; Chapin v. Curtenius, 15 Ill., 427; Masterton v. Beasley, 3 Ohio, 310). An act done by one in the name and for the benefit of an interested principal is to be presumed to have been effected in that interest, and unless repudiated by the person or party for whom it is assumed to be transacted, is to be deemed accepted as such an act of agency for the avowed principal.

It was so claimed in the matter now under consideration, and it does not lie with the adverse party in interest to assert that the assumed agent, whose acts were in no way disclaimed, but were relied upon by those for whom he professed to act, had no authority (Masterton v. Beasley, supra). Indeed, it would be difficult to hold in any case that the mere intervention of a stranger for the benefit of one entitled to redeem his lands from forfeiture, should (unless expressly repudiated) be held ineffectual for that purpose.

The right of redemption of the land, for and on behalf of Francis Price, being shown to exist, and its

exercise having been duly proved, the defendant fails to establish any foundation for his claim of title, and the judgment against him should be affirmed.

Judgment affirmed.

ERICKSON against QUINN.

Court of Appeals; December, 1872.

CREDITOR'S ACTION.—JUDGMENT LIEN.—DECREE.—
EXECUTION.

The plaintiff in a creditor's action may, pending the action, and without waiving or abandoning the lien of his judgment, proceed to sell the debtor's lands on execution upon his judgment.

Having done so, he may still proceed with the creditor's action, to obtain a judgment removing the cloud upon title.

The various remedies of a creditor to enforce his judgment, -stated.

Aaron Erickson and another brought this action, in the nature of a creditor's bill, against Mary A. Quinn and others, to reach certain real property alleged to have been conveyed to the defendant, Mary, with intent to defraud the creditors of one O'Maley.

The Union Bank, afterwards the National Union Bank of Rochester, recovered judgment in 1861 against O'Maley, and execution was issued, and returned unsatisfied in part. At the time of contracting the debt apon which this judgment was recovered, O'Maley was owner in fee of the real property which the plaintiff now sought to reach. Shortly before the recovery of the judgment, O'Maley, with intent to defraud his

creditors, conveyed the property to his son-in-law, John Quinn, the husband of the present defendant, Mary. John and Mary, subsequent to the recovery of the judgment, conveyed the property to one Hart, who afterwards conveyed it to Mary.

The judgment having been assigned to the plaintiffs, they brought this action to set aside these conveyances, and subject the property to their judgment; and the complaint asked the appointment of a receiver,

and a sale of the property.

On the first trial of the action defendants prevailed; but the plaintiffs appealed; and pending their appeal they also issued execution on their original judgment, and advertised the property for sale. Defendants moved to set aside the execution; and the parties thereupon stipulated that no sale should be had until after decision of the appeal from the judgment in the creditor's suit. The judgment in the creditor's suit having been reversed on appeal (3 Lans., 299), plaintiffs caused the property to be sold under the execution, and bought it in for the full amount of their claim. They still continued their creditor's action, no longer, however, seeking a receiver, but treating the action as one to remove obstacles to their judgment. On the second trial, the referee held the conveyance to defendant to be fraudulent and void. The judgment of this court to that effect, with modification as to costs, is reported in 47 N. Y. 410.

The defendant then moved in the court below, upon affidavits of the fact that the execution sale had been had pending the creditor's action, and that defendant was ignorant thereof, and obtained an order setting aside the judgment in the creditor's action, and the report of the referee; and giving defendant leave to put in a supplementary answer, pleading the sale on the original judgment as a satisfaction of the judgment, and a bar to the creditor's action. The supreme

court, on appeal, reversed this order, and defendant appealed to this court.

Defendant also moved in this court to vacate the previous judgment of this court in the creditor's action (47 N. Y., 410), upon the same ground.

J. C. Cochran, for appellant.

G. F. Danforth, for respondent.

BY THE COURT.—ALLEN, J.—The plaintiffs, judgment creditors of O'Maley, in pursuing their remedy against the lands alleged to have been fraudulently conveyed to the defendant, had the choice of three several proceedings. They might have sold the premises by execution on the judgment, and left the purchaser, after his title should become perfect by a deed from the sheriff, to contest the validity of the defendant's title, in an action of ejectment; or, secondly, they might have issued their execution and brought their action to remove the fraudulent obstruction, and awaited the result of the action before selling the property; or, thirdly, they had the right, upon the return of an execution unsatisfied, to bring an action in the nature of a creditor's bill, to have the conveyance to the defendant adjudged fraudulent as against their judgment, and the lands sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment as equitable interests and things in nature of a judgment debtor are reached and applied to the satisfaction of judgments against them.

Chautauqua Co. Bank v. White, 1 Comst., 236, is authority for the last mentioned course of procedure, and Chautauqua Co. Bank v. Risley, 19 N. Y., 369, holding that a creditor pursuing his remedy in that form is liable to lose the priority of his lien by judgment, and must take title subject to all liens existing

before the commencement of his action, makes it for the interest of the judgment creditors to pursue their remedy under their judgment, and by execution, rather than by equitable action. The plaintiffs framed their complaint as in a creditor's suit, and asked the appointment of a receiver, and a sale of the property, and the facts averred authorized the relief demanded.

But after the first trial of the action, and pending an appeal from the judgment, they issued an execution and advertised the property for sale, and a motion being made to set aside the execution upon some ground not disclosed, but evidently not for the reason that the two remedies were incompatible, it was agreed that no sale should be had until after the decision of the appeal. That judgment was reversed, and the plaintiffs, relieved from their stipulation, then caused the property to be sold on their execution, and became the purchasers for the full amount of their claim. From that time they seem to have treated the action as brought and prosecuted to remove obstructions to their judgment and execution. If an execution in the hands of the sheriff was necessary to authorize the intervention of the court, that fact was not averred or proved, neither was any objection taken for the want of such averment and proof.

Whether the judgment being a lien, an execution was necessary to an action to remove a fraudulent obstruction and hindrance to its collection may be doubtful, but need not be decided (see Spear v. Wardell, 1 Comst., 144). The judgment of the referee upon the second trial was limited to a declaration and adjudication that the conveyance to the defendant was fraudulent and void as against the plaintiffs, and that their judgment was a lien upon the property described, and that judgment was affirmed by the supreme court and in this court. The defendant at no stage of the action objected that the judgment did not go far enough, in

that it did not direct or authorize a sale and application of the property to the satisfaction of the judgment. She acquiesced in the form of the judgment, and only contested the main issue, which was as to the validity of her deed. It is not very apparent that she could have interposed an objection that would have availed her. If the deed under which she claimed was fraudulent, the judgment creditors of the fraudulent grantee had a legal as well as an equitable right to the benefit of their judgment and the fruits of their action, and were not bound to waive or abandon the lien of their judgment and substitute the equitable lien under their lis pendens of a later date. Had the facts now relied upon been suggested upon the hearing of the appeal in this court the judgment would probably have been the same. The plaintiffs had a standing in court. and were entitled to the relief they obtained. If there was any incompatibility in pursuing their legal remedy, the latter should have been arrested or controlled to meet the exigencies of the judgment in this action. There was no fraud or legal irregularity in proceeding with the action, and, pending it, to sell the property upon execution. There is no evidence of intentional concealment of the sale, and the proceedings to acquire the title under it. The court below were not authorized upon the facts alleged to interfere with, and either modify or set aside the judgments of this court.

The order appealed from must be affirmed.

All the judges concurred except Church, Ch. J., not voting.

ANONYMOUS.

Supreme Court, First Department, First District; General Term, January, 1874.

DIVORCE.—PLEADING.—PARTIES.—AFFIRMATIVE RELIEF.

In an action for divorce, brought by a husband against his second wife, on the ground that he had a first wife living at the time of the second marriage, he obtained a divorce by her failure to defend; and he afterward married a third wife. The second wife was subsequently allowed to open the judgment of divorce on the ground of fraud, and to put in an answer alleging the validity of the second marriage. The third wife then obtained leave of court to intervene, and she put in an answer alleging the invalidity of the second marriage and insisting on the validity of her own, the third. Held, that without any amendment of the complaint, the court could not adjudge both the second and third marriages void.

It is only where such relief is applied for in the manner prescribed for in the statute, by one of the parties to the marriage claimed to be unlawful on account of the existence of a former husband or wife of one of them, that the statute allows such marriage to be ad-

judged void.*

The relief to be awarded in an equitable action must be in accordance with the allegations of the pleadings as well as with the proofs. It is not sufficient in such a case to sustain a judgment in favor of the plaintiff, for relief that he has not asked for, and on a ground not submitted to the court by his complaint, that it appears from the proofs taken that he may be entitled to it.

The plaintiff in this action married his first wife in England in 1839; soon separated from her and married a second wife in this country in 1843; obtained a divorce from the second wife in 1864, in an action which she did not defend; and in 1865 married a third wife, both the first and second being living. The questions

now before the court arose out of the application of the second wife, on which the judgment of divorce was opened, thus reinstating her again, and the consequent application of the third wife to be allowed to intervene and litigate for her own protection in defense of the third marriage. The details necessary to an understanding of the decision are as follows.

The plaintiff, who was then a resident of England, on April 23, 1839, married his wife No. 1, and after living with her for about one year, left and abandoned her, and came to the city of New York, where he has since resided. About three months after her abandonment by the plaintiff, she was delivered of a daughter. the result of their marriage. On or about May 31, 1843, a deed of separation was executed between them, providing, among other things, that they should live separate and apart from each other, but containing nothing. whatever from which it could be claimed, or inferred, that either of them was to be at liberty to marry again. But notwithstanding the fact that the marriage itself continued in force, the plaintiff's wife intermarried again with another man in England, on September 3, 1843; and the plaintiff himself, on October 31, 1843, at Brooklyn, married his wife No. 2, the real defendant in this action. After living with her for twenty years, and having by her five children, who are still living, he separated from her, on the unfounded pretense that he was in danger of disturbance from the interference of his first wife, and that he had just discovered that his second marriage was void, because he had no right to contract it, as he supposed he had, by force of the deed of separation between himself and his first wife. He appears to have succeeded in impressing the wife of the second marriage with the conviction that his marriage with her was void for the reason assigned by him, and she submitted to an adjudication of that fact in this action without interposing any defense.

That adjudication seems to have been greatly owing to the evidence of a witness named John Slade, who was produced, on the reference ordered to take proof of the facts, by the plaintiff, and whose evidence there is good reason to believe was willfully and completely false.

On March 7, 1864, the judgment was recovered, declaring the marriage solemnized in 1843 void, for the reason that the plaintiff's first wife continued to be alive; and while the plaintiff had no reason whatever for supposing his first wife to have died in the mean time, and after having himself, on the reference ordered in the action, shown her to be living, he married his wife No. 3, the present respondent, on July 1, 1865, and continued to live with her as his wife, until about October 6, 1871, they having during that time two children.

On October 18, 1871, the wife No. 2 applied to the court to be permitted to defend the action in which her marriage had been adjudged unlawful, for the reason that she was deceived by the plaintiff's representations, and by that means was induced to allow the action to be undefended. The court on October 24 vacated the previous judgment, and allowed her to serve an answer to the complaint, which she did, alleging the validity of her marriage with the plaintiff. The present respondent, the wife No. 3, claiming that the last proceeding was collusive, and instituted for the real purpose of establishing the second marriage as valid, was on January 3, 1872, allowed to intervene in the action, for her own protection, and made a party with leave to plead her own rights as against either party to the action. Under that permission an answer was served. in her behalf, setting forth in substance the invalidity of the second marriage, and insisting upon the validity of her own marriage with the plaintiff. The plaintiff's complaint was in no respect changed, and no reply was made by the plaintiff to this answer.

But the wife of the second marriage replied to the petition of the third wife (on which she had been allowed to become a party), and serve her answer, alleging the validity of the second and the invalidity of the third marriage.

The case was referred to and heard before a referee. who reported in favor of the plaintiff, against both the second and third wife, and in favor of judgment to that effect. The third wife excepted to the conclusions of the referee, that the plaintiff was entitled to judgment against her, establishing the nullity of her marriage, and the court on argument sustained her exceptions and denied the plaintiff that judgment. From the order containing that denial the plaintiff has appealed.

Smith E. Lane and T. C. T. Buckley, for appellant.-I. Under sections 118 and 122 of the Code, the court had power to make No. 3 a party (Davis v. Mayor, &c., 2 Duer, 663; Shaver v. Brainard, 29 Barb., 25; Tonnele v. Hall, 3 Abb. Pr., 205; Waring v. Waring, 1d., 246. Likewise in equity. Story Eq. Pl., 5 ed., §§ 72, 137; Calvert on Parties, 3; Redesd. Pl., 164).

II. The rule is especially applicable to an intervenor on her own application (Story Eq. Pl., 8 ed., § 237, a and b). Her answer submitted the question and supplied the want of allegations in the complaint (Bate v. Graham, 11 N. Y. [1 Kern.] 237).

III. The several causes might be united (Code, § 167;

Vermeale v. Beck, 15 How. Pr., 333).

W. C. Barrett and John L. Hill, for respondent. Cited Woods v. De Figaniere, 16 Abb. Pr., 1; Porter v. Mount, 45 Barb., 422; Bailey v. Rider, 10 N. Y. [6 Seld.] 363; James v. McKernon, 6 Johns. 543, 559; Tripp v. Vincent, 3 Barb. Ch., 613; Jones v. Grant, 10

Paige, 348; Ward v. Davis, 3 Sandf., 510; Wright v. Delafield, 25 N. Y. 266; Brazill v. Isham, 12 Id., 17; Robbins v. Richardson, 2 Bosw., 255; Code, § 275; Crosby v. Leary, 6 Bosw., 312.

BY THE COURT.—DANIELS, J.—Although the plaintiff's third wife was allowed to make herself a party to the present action, after the judgment in it was vacated and the second wife allowed to defend and to plead her rights as against either of the parties, and afterwards did so by her answer, that did not enlarge or extend the nature of plaintiff's action for relief, as it was presented by the complaint made by him. The action still continued to be the same, simply an action to secure a decree of nullity of the plaintiff's second marriage. It was framed before the third marriage took place, and from the nature of things could have no possible relation to it. The object of the respondent's answer was not the extension of the plaintiff's action, so as to bring in controversy the validity of her own marriage, but to maintain the correctness of the plaintiff's complaint, as to the unlawful nature of the marriage immediately preceding her own. This was for her own protection and the protection of her two children, not to supply the plaintiff with any legal pretense for repudiating her in disgrace, as he had her predecessor, by showing her marriage to be void for the same reason that allowed him to disregard the second wife. When either the respondent or the plaintiff himself succeeded in maintaining the validity of the second marriage, that was the end of her presence as a party in the controversy. That accomplished the real object for which she was allowed to answer, and so far protected and assured her rights to the plaintiff as her husband.

Whether her marriage should also be annulled, was a question in no way put in issue by the parties.

The plaintiff had made no such claim by his complaint, and the respondent asked no relief of that description by her answer, and it is only where that relief is applied for in the manner prescribed in the statute, by one of the parties to the marriage, claimed to be unlawful on account of the existence of a former husband or wife of one of the parties, that the statute has provided for its allowance (3 Rev. Stat., 5 ed., 234, 235, §§ 36–48).

No such application was in any proper manner made in this action, and for that reason it was properly denied by the court, notwithstanding the conclusions contained in the report of the referee. The relief to be awarded in an equitable action as this was, must still be in accordance with the allegations as well as the proofs. That it appears from the proofs taken that the plaintiff may be entitled to it, is not sufficient when the pleadings have wholly omitted to present the matter for the action and adjudication of the court (Field v. Mayor, 2 Seld., 179; Kelsey v. Western, 2 Comst., 501, 506; Rome Exch. Bank v. Eames, 3 Abb. Ct. App. Dec., 83; S. C., 1 Keyes, 588). The plaintiff, whose good fortune has so far shielded him from the legal consequences of his repeated violations of the laws of the State, may yet be able to secure the right now denied him, but that would be a very inadequate reason for relieving him from the ordinary requirements the statute has prescribed for cases of this description. If he is to be relieved at all, and under the sanction of the judgment of a court of justice be placed in a situation where he may deceive and induce still another woman to marry him, it should only be by strictly bringing himself within all the provisions of the statute upon this subject, whether they relate to the grounds of the action itself or the forms to be observed in bringing them to the notice of the court. The case is one of strict right and not one which deserves to be promoted by any favorable interposition on the part of a court of justice. When neither the fear of

the laws nor the duty of securing a reputable social position for his own children, has proved sufficient to restrain the plaintiff from the open violation of their prohibitions, he should not only prove, but in addition to that, present by his complaint in the mode prescribed for that purpose by the statute, the case which may entitle him to be set at liberty to indulge in a repetition of his former offenses. Until that shall be done, no injury whatever can result from subordinating his freedom to the obligations he apparently regards as the inconvenient consequences of his third marriage.

The plaintiff is entitled to no such relief as he now demands in this action. It has neither been demanded by himself nor by his wife, as the statute requires such an application to be made. For that reason the order appealed from was strictly right, and it should, therefore, be affirmed, with costs.

ROBERTS against BERDELL.

Court of Appeals; February, 1873.

PAYMENT.—CAUSE OF ACTION.—LIMITATIONS.—Conversion.

For the purpose of satisfying a pledgee's claim, and sustaining an action for a conversion of the pledge, a payment of the claim, made on account of the debtor, although without his knowledge, is equivalent to a payment by himself.

Where the pledgor, after learning of such a payment, applied repeatedly for a re-delivery of the pledge, and was put off by the pledgee, and finally disavowed the alleged payment, and made a formal demand of the pledge, coupled with an offer to pay what

was due, but without a tender, and the pledgee then for the first time absolutely refused to deliver the pledge;—Held, that an action for conversion could be sustained on proof that the payment was actually previously made.

The cause of action was not barred until six years after the formal demand and refusal, although the payment and previous requests for a return of the pledge took place more than six years before the action was brought.

Demand and refusal are evidence of a conversion at the time of the refusal.

Sidney D. Roberts sued Robert H. Berdell in the supreme court, to recover damages for the alleged conversion by defendant of four mortgage bonds of the Long Dock Company, which belonged to one Seymour, and were pledged by him with defendant as security for a loan, and which defendant after repayment of the loan refused to return to Seymour. Plaintiff claimed to recover as Seymour's assignee of the cause of action.

In 1856, defendant was acting president of the Long Dock Company. Seymour was a contractor with the company for building a tunnel. Seymour's contract provided that he should be paid partly in the bonds of the company, by the acting president, upon Seymour's requisitions upon the company. It being desired that the bonds of the company should not be thrown upon the market pending certain negotiations for the sale of a large amount of the bonds, the defendant made advances to Seymour on a pledge of several of the bonds that he received as the work progressed. There was some conflict in the testimony as to whether these payments were intended by defendant as loans made by himself personally or as advances by the company; but the weight of evidence was clearly that defendant made the loans individually. Defendant, however, reported to the company in his monthly accounts the amount of these loans, as advances made to Seymour;

and they were charged to Seymour against credits given to him for his work. These loans were thus in effect reimbursed, more than six years before the commencement of the action. Seymour testified on the trial that in March, 1861, at an interview with defendant, it was agreed to let the accounts stand as representing the transaction, and that defendant promised to hand him the bonds in a few days. Defendant requested Seymour to call at his store to receive them. Witness went to the store in a few days and saw the bonds. Defendant said he must see the agents of the company before he could give up the bonds. Witness called at the store probably twenty times to get the bonds, and have the other matters settled if possible. He called again the last time in June, 1861, told defendant that he wanted his bonds; it was not a company matter and he would refund the loan with interest if defendant would give witness the bonds. Defendant said it was a private loan; that he understood witness had commenced proceedings against the company, and therefore he would not settle anything. This was the first time he ever refused to give witness the bonds.

The supreme court sustained a judgment in favor of plaintiff, awarded by the referee, and held that the statute of limitations commenced running when this last demand was made, and defendant refused to deliver the bonds, i. e., in June, 1861. Defendant appealed.

Samuel J. Glassey, for defendant, appellant.—Besides insisting that the finding of payment was against the weight of evidence and unsupported by the evidence, insisted that the action was barred by the statute of limitations; that the several loans were independent transactions; that the alleged demand in June, 1861, would not sustain the action, if it was accompanied by an admission that the debt was still unpaid,

and by a promise to pay, when no tender was made. That by the finding of payment it appeared that defendant had wrongfully retained the bonds for a year before this last demand, and they had been repeatedly called for, so that the cause of action accrued more than six years before the suit was brought. Plaintiff's subsequent demand did not extend the time (Kelsey v. Griswold, 6 Barb., 436; Bucklin v. Ford, 5 Id., 399; Roberts v. Sykes, 30 Id., 173). Defendant's promise to return the bonds, after demand, and failure to do so, was a conversion, more than six years before suit brought (Durell v. Mozier, 8 Johns., 445; Farrington v. Paine, 15 Id., 430). So too the demand made a few days after the promise to return them, was sufficient, and the failure to get them was a refusal (Watkins v. Woolley, 1 Gow., 69; Golightly v. Ryn, Loft., 88; Davies v. Nicholas, 7 Carr. & P., 339); and the request to see the other agents of the company before returning the bonds was equivalent to a refusal (Davies v. Vernan, 6 Ad. & El. N. S., 443); hence the conversion was more than six years before suit brought.

Thomas Henry Edsall, for plaintiff, respondent.—As to the statute of limitations, cited 1 Chitty's Pl., 14 Am. ed., 157, and cases cited; Howland v. Edmond, 24 N. Y., 308; Pars. on Cont., 91; Bain v. Walker, 12 Barb., 298; Kelsey v. Griswold, 6 Id., 437; Little v. Blunt, 9 Pick., 487; and distinguished Roberts v. Sykes, as not applicable, but only requiring payment to be made within six years of the pledge.

By the Court.—Allen, J. [After disposing of an appeal from an order refusing a new trial, as being a non-appealable order.]—The referee has found that the four bonds were pledged to the defendant as security for these several loans by him to Seymour, and that "each of said loans was repaid to said defendant

within thirty days after date by said Seymour." And it is claimed upon the appeal from the judgment that this last finding was entirely without evidence. The precise time of the payment is not an essential part of the finding. If paid at all, it is not disputed that they were paid before the demand of the bonds by Seymour, and if there was evidence that the loans were paid in behalf and on account of the borrower, it was equivalent to a payment by him in person, and the finding would be justified.

The only material fact found was the repayment of the loans to the defendant, before the demand was made of a re-delivery of the bonds. The evidence did tend to prove a payment as found. Seymour was at the time of the loans constructing the Bergen tunnel under a contract with the Long Dock Company, and the defendant, as the acting president of the company, made advances upon the work, on the requisition of Seymour, and at the end of each month was repaid by the company, and the advances were charged by it to Seymour as payments on his contract. These loans were reported to the company by the defendant as advances, and credited to him and charged to Seymour, and this was assented to by the latter at an interview between himself and the defendant, and in the words of Mr. Seymour, "Mr. Berdell promised to return the bonds and to let the account stand as it was, as he, Berdell, had been paid his loans."

Mr. Seymour was corroborated by his own book-keeper, who was present. He was contradicted by the defendant as to the fact that these loans were by him and not by the Long Dock Company, but on cross-examination he does say, that it was his intention at the time to make a personal loan, but changed his mind, although he did not notify Seymour of such change. He does, however, admit in substance, that it was arranged, as testified to by Seymour, that the moneys

should remain charged to Seymour in account with the Long Dock Company, and does not claim that he is out of pocket. On the contrary, the plain inference from his own statement is that he has been reimbursed the loans by the Long Dock Company.

It is not objected here that the report of the referee, that the loans were made by the defendant and the bonds received by him in pledge for the debt to him, is not warranted by the evidence. Neither is it objected that the evidence does not show that the defendant has been reimbursed by the Long Dock Company. It follows,—all the parties, Berdell, the lender, and who, as he says, himself was acting as president of the Long Dock Company, having "the entire charge of the affairs of the company, in relation to Mr. Seymour," Seymour, the borrower, and Mr. Brunner, the auditor of the company, having consented that the loans should be regarded as payments upon the Seymour contract, and the same being charged to Mr. S., upon his contract, and Berdell repaid as in the case of other advances made by him for the company,—that the loans were paid by Seymour as found by the referee. They were paid from money due to him and by his debtor.

There is no finding as to any reconsideration of the arrangement, and a withdrawal of these items from the accounts between Seymour and the Long Dock Com-

pany.

The loans being paid, Mr. Seymour was entitled to a return of the bonds, as the defendant had no longer any claim or lien upon them. From that time he was a naked bailee of the bonds, holding them for Seymour.

This disposes of the next objection taken by the appellant, that the motion for a nonsuit should have been granted at the close of the plaintiff's evidence. No reasons were assigned for the motion upon the trial or in this court. It was properly denied.

The only other ground, urged in this court for a reversal of the judgment, is that the action was barred by the statute of limitations.

After the payment of the loans in the manner and by the arrangement stated, the plaintiff's assignor on several occasions asked the defendant for his bonds, but was put off by evasive answers, and the claim was not insisted upon until the last of June, 1861, after he had quit the work on the tunnel. He then made a formal demand of the defendant for the bonds, and he refused to deliver them, and Seymour says this was the first time he ever refused to give him the bonds.

The action was brought in less than six years after this demand. The referee finds no other demand or refusal, or any conversion at any other time, or any facts from which a conversion at any other time can be inferred.

The cause of action arose upon a conversion of the bonds by the defendant, and the demand and refusal is only evidence of a conversion, and is evidence of a conversion, at the time of the refusal. It follows that the statute of limitations had not run against the action. If there had been a prior demand and refusal, or a conversion prior to that time, which would have given the plaintiff's assignor a right of action, the fact should have been proved and found by the referee.

A mere omission of the defendant to return the bonds after the payment of his debt was not a conversion, and no conversion can be presumed prior to the demand and refusal in June, 1861 (Phillpot v. Kelly, 3 Ad. & El., 106; Brown v. Cook, 9 Johns., 361).

The judgment must be affirmed.

RICHARDS against JUDD.

Supreme Court, First Department, First District; General Term, January, 1874.

EXAMINATION OF PARTY.—REFUSAL TO ANSWER.—
STRIKING OUT COMPLAINT.—LIBEL.

If a party, attending to testify on his examination as a witness before trial at the instance of the adverse party, refuses to answer a material and proper question, his pleading may be stricken out.

Plaintiff, the vendor of a medicine which he advertised as compounded of powerful ingredients and having great virtues, brought an action for libel against defendants, who had denounced him as a quack and his medicine as a humbug; and the defendants, in their answer, justified by alleging the worthless and deceptive character of his medicines. Held, that plaintiff, on examination at the instance of defendants before the trial, under sections 391—394 of the Code, was bound to answer specifically a question as to what ingredients his medicine was composed of.

David Richards sued Orange Judd and others for libel, and the cause now came before the court on appeal from an order of the special term, striking out the complaint, and dismissing the same with costs, for plaintiff's refusal to answer certain questions propounded to him as a witness, pursuant to the order of the court.

The plaintiff alleged in his complaint, in substance, that he is and has for many years been the sole proprietor, owner and manufacturer of articles of medicine and merchandise, generally and publicly known as Dr. Richau's Golden Remedies; which he has for ten years last past manufactured and put up, and offered for sale and sold; and that, by means of extensive advertising and the good qualities of such Golden Remedies, he has secured large sales and profits.

He also alleged, that the defendants are publishers of a monthly magazine, known as the American Agriculturist, and having a circulation monthly of two hundred and fifty thousand copies; that in November, 1872, the defendants published in their said magazine a certain libelous article, in the following words: "SUNDRY HUMBUGS.-Our newer readers keep inquiring about the trustworthiness of this, that and the other doctor for various diseases. We answer, that every so-called physician, every medical institute, or college or association that advertises medicine or medical advice. by circular or otherwise, is a quack; in short, a swindle. The whole tribe of those who advertise 'marriage guides,' 'female medicines,' 'advice to the young,' 'errors of youth,' 'eye doctors,' 'ear doctors,' 'consumption curers,' 'cancer doctors or medicines,' &c., &c., are positively quacks and impostors; to whom it is unsafe to address even a letter of inquiry; also, the 'Golden Remedies,' inquired about by several, are nonsensical quackery. We have not room for a lot more of humbugs on hand, but will renew the war upon them in the next volume; and, as hitherto, we expect to shield at least all our readers from swindlers, and, through them, many other people."

The plaintiff alleged also, that the defendants, by means of these words, published as hereinbefore set forth, insinuated, and meant to be understood by those to whom it was published, and to the public at large, as charging the plaintiff with being a quack, impostor and swindler, and that the said "Golden Remedies," manufactured solely by the plaintiff, were wholly valueless and useless, and possessing no medical qualities whatever, and that by means of the publication the plaintiff has been injured in his reputation and in his business, and been deprived of custom and trade, and lost the sale of goods and profits, which he would

otherwise have made, to his damage twenty-five thousand dollars.

The defendants in their answer admit, in substance, that they are publishers of the American Agriculturist, and that, in December, 1872, they published the article under the caption of "Sundry Humbugs," above set forth. They allege also, that the publication is substantially true, and was published with good motives and for justifiable ends. They also set out, in extenso, the circulars sent forth by the defendant with his "Golden Remedies," in which the plaintiff describes himself as a physician who has had a general practice in all parts of the world; and they aver various facts tending to show that the alleged medicines of plaintiff are valueless as remedies for disease, being compounds costing but a few cents per bottle, and selling at several dollars, which the public would shun if the constituent parts were known.

The defendants propose in their answer to give evidence of all the various facts alleged, both in justification and in mitigation of damages.*

Issue being joined, the defendants upon affidavit procured an order and summons for the examination of plaintiff as a witness on their behalf, before the trial.

On such examination, the plaintiff testified that a bottle marked "Dr. Richau's Golden Remedies, No. 2," was one of the medicines he advertises and vends to the public. He was then asked of what balsam No. 2 was composed? He refused to answer the question, on the ground that it was irrelevant, immaterial, and a secret in his trade. The judge directed the plaintiff to answer the question. He then answered: "It is a secret compound, composed of various ingredients,

^{*} A motion to compel an amendment of a similar answer is reported in 11 Abb. Pr. N. S., 390.

which possess great medicinal properties;" and refused to state the names of the ingredients.

He then gave evidence showing that he was not a doctor of medicine, and had never received a diploma, and had not been engaged in a general practice of medicine in any part of the United States.

He then testified that he advertised "Doctor Richau's Golden Elixir de Amour, or Elixir of Love;" and being asked, "of what is it composed?" he refused to answer.

The court at special term, after argument, ruled that the plaintiff must answer the question which had been propounded; and on the question being repeated to him, he answered: "It is a secret compound of various ingredients which possess great medicinal properties;" and refused absolutely to give any other answer.

The court at special term, on presentation of these facts, held that the answer was evasive; and the plaintiff, under the advice of his counsel, refusing to give any other answer, the court ordered his complaint to be stricken out and dismissed, with costs.

Plaintiff appealed.

John S. Walker, for plaintiff, appellant,—Insisted that the constituents of the medicines were not in issue (Greenl. on Ev., § 51); and even were they revealed, the only question would be, will the medicines cure? (Murch v. Davidson, 9 Paige, 580; Swift v. Dickerman, 31 Conn., 285). The court cannot compel specific articles to be produced by the party (Anson v. Tuska, 19 Abb. Pr., 391). A defendant in libel cannot call on plaintiff to help him prove his defense by revealing the constituents of the goods (Day v. Tucket, 1 Bail. Ct., 203; Met. Saloon Co. v. Hawkin, 4 Hulst. & M., 146; Townshend on Slander & L., 366). The secret of the manufacture of the remedies is plaintiff's property, a

subject of sale, and cannot be taken without due process of law (Jarvis v. Peck, 10 P. Wms., 118, and cases cited: Const. of N. Y., art. 1, § 6).

Amos G. Hull, for defendants, respondents,—Cited, besides the cases in the opinion, Fetridge v. Wells, 4 Abb. Pr., 194; S. C., 13 How. Pr., 396; Pidings v. How, 8 Sim., 479; Perry v. Trufitt, 6 Beav., 66; Halloway v. Hooway, 13 Id., 213; Burnett v. Phalon, 11 Abb. Pr., 157; S. C., 19 How. Pr., 530; Bull v. Lovelace, 10 Dick., 9.

BY THE COURT.*—DAVIS, P. J. [After stating the facts.]—By the allegations of his complaint the plaintiff had invited an issue as to the medicinal qualities and value of the "Golden Remedies."

The statement of the alleged libel, so far as it pointed directly to the plaintiff or his remedies, was to the effect that his "Golden Remedies" are "non-sensical quackery;" and it is chiefly of this statement that the plaintiff complains.

The defendants undertake by their answer to show that this statement is true.

No one can read the circulars of the plaintiff, as proved by himself on his examination, without observing the importance of the investigation sought to be made.

It was competent to disprove the assertions of the circulars and of the complaint, by ascertaining the ingredients of the several compounds, for the purpose of showing that they possess no such medicinal virtues as are claimed by plaintiff.

For instance, he asserts in his circular that his "Elixir of Love" is composed of the most powerful ingredients of the vegetable kingdom, "harmless, but

^{*} Present, Davis, P. J., and Donohue and Daniels, JJ.

speedy in restoring healthy action;" and again: "It is the fountain of youth to old age; the rejuvenator of pristine vigor in the young; to the barren women of our land it is a special blessing." Indeed, it is impossible to read the vulgar, and in many respects shameful assertions and instructions that accompany the compounds of plaintiff, without being struck with the vileness of the impostures. That he can bring an action of libel for injury alleged to be done to his trade in his medicines, by denouncing them as arrant quackery, and at the same time protect himself against exposure by claiming them to be valuable secrets, is a proposition that cannot be maintained (Byrn r. Judd, 11 Abb. Pr. N. S., 390; and see 11 N. Y. [1 Kern.], 347).

In the laudable exposure of such "humbugs" as the pretended medicine of plaintiff and others, the defendants take upon themselves great risks, and subject themselves to the annoyance of suits; but I think they are not exposed to any danger that courts will interpose any shield for the protection of parties guilty of fraud and deception of the public.

If the plaintiff did not choose to try the question of the true character of his "Golden Remedies," he should have kept out of a court of justice.

The order of the court below was correct, and should be affirmed, with ten dollars costs and disbursements.

Daniels and Donohue, JJ., concurred.

Order accordingly.

Dowling v. Bucking.

DOWLING against BUCKING.

Court of Appeals; May, 1873.

COSTS.-LIABILITY OF NOMINAL PARTY.

It seems, that under section 321 of the Code,—declaring that an assignee, &c. of the cause of action pending the suit shall be liable for the costs in the same manner as if he were a party,—an absolute assignee is liable, irrespective of the question whether he ever took any part in prosecuting the action.

That section, however, does not render liable a person who merely takes an assignment of the claim as collateral security.*

R. H. Dowling took proceedings in the New York common pleas to foreclose a mechanic's lien upon premises owned by the defendant, Charles P. Bucking. Pending the proceedings, the claimant assigned his claim to Messrs. Hills & Wakeman, as collateral security for his indebtedness to them. The assignment is stated in the opinion.

The common pleas, on appeal from an order denying defendant's motion to compel these assignees to pay the costs of the unsuccessful prosecution of the suit, held that, as it did not appear that the assignees had conducted or carried on the proceeding, or aided in so doing, they were not liable. Defendant appealed to this court.

Augustus Smith, for appellant.

T. B. Wakeman, opposed.

BY THE COURT.—PECKHAM, J.—This is an appeal from an order of the general term of the court of com-

^{*} Compare Voorhees v. McCartney, 51 N. F. 887.

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mon pleas of the city of New York, affirming an order denying the motion of the defendant, Bucking, that Hills & Wakeman, the alleged assignees and owners of the demand in this case, pay the costs of the successful defense therein.

During the pendency of the suit to establish a lien, the claimant assigned his claim in writing to his creditors, Hills & Wakeman, "to take and hold, and to proceed to enforce the same in my name, and for me, and to collect, have and receive all the papers, proceedings and matters concerning the same, in their own control, and to collect and have all the moneys that may be obtained in any suit now pending, or to be commenced, or from settlement or compromise, that they in their discretion may think best, to complete;
. . . and I agree to aid the prosecution of said claim, and do all I can to insure the collection of the same."

This was conditioned that the assignees should from the proceeds first pay the debt due them from the assignor, and then pay the balance to him. The assignees under this assignment agreed in these words: "We hereby agree to the condition of the foregoing instrument."

Considerable evidence was before the court, taken by commission and by affidavit, touching the question whether the assignees had in fact carried on the suit, or had merely held the claim as collateral. The court below arrived at the conclusion that they had not conducted or carried on the suit, or aided in doing so. I have carefully examined the testimony; and, although there is some slight evidence of a contrary tendency, the substance of the case is with the respondents. The original case was on trial before a referee for a long time; the costs of defending the action were some eight hundred dollars. But the evidence establishes that neither of the assignees ever attended a hearing

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before the referee. That they never employed the attorney or the counsel for prosecuting the claim, met or advised with either. The attorney was employed before the assignment; and the attorney was paid exclusively, so far as he had any pay, by the assignor, who gave his personal attention to the prosecution. Fifty dollars for that purpose he borrowed of the assignees. The assignees explicitly deny that they ever took any part in the prosecution, and it is clear they did not take any substantial part. The assignor, by all the testimony, was the man who acted for the claim. It is the duty of the movers to make out an affirmative case. Upon the whole evidence, I think they fail.

I have examined this question as to prosecuting the claim, because it was strenuously argued by both parties. Prior to the Code, it would have been pertinent; since the Code, I think the sole question, was the assignee the actual owner?

The Code provides that, in actions in which the cause of action shall by assignment after the commencement of the action, or in any other manner become the property of a person not a party to the action, such person "shall be liable for the costs in the same manner as if he were a party" (Code, § 321).

It is settled that this provision does not include a person who merely takes the claim as collateral security (Wolcott r. Holcomb, 31 N. Y. 125). Confessedly, these assignees never took this assignment otherwise than as collateral security.

Therefore, the order should be affirmed.

All the judges concurred.

Order affirmed.

Towle v. Covert.

TOWLE against COVERT.

New York Common Pleas; General Term, January, 1874.

JURISDICTION.—ATTACHMENT.

The New York common pleas cannot acquire jurisdiction of an action upon contract for the recovery of money only, against a non-resident defendant, by service by publication, and by the issue and levy of an attachment, as a provisional remedy, upon his property within the county.

But in such case the warrant of attachment will not necessarily be set aside, because it may be issued before service of summons.

Appeal from an order.

This action was brought by Hamilton E. Towle against Hiram C. Covert.

J. Langdon Ward, for plaintiff and respondent. Elliott F. Shepard, for defendant and appellant.

By the Court.*—The action was upon contract for the recovery of money only. Prior to the act, chap. 239, Laws of 1873, this court would have jurisdiction of the action if the defendant resided in the city of New York, or was served with the summons therein (Code, § 33). The action having been brought after the passage of the act aforesaid, the court, on proof that the defendant was not a resident of this State, and could not be found therein, but had property therein liable to attachment, made an order for the publication of the summons and service by mail thereof, and granted a warrant of attachment against de fendant's property. On failure of defendant to an-

^{*}Present, Daly, Ch. J., and Robinson and J. F. Daly, JJ. N. s.—xv.—13

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swer, and on due proof of service by publication of summons, and of levy under the attachment issued, judgment was entered against the defendant.

The judgment was irregular, this court not having acquired jurisdiction (Landers v. Staten Island R. R. Co., 14 Abb. Pr. N. S., 346). The order of publication, the judgment and all proceedings thereunder, and the

levy under the attachment must be set aside.

The warrant of attachment will not be set aside, because it may be *issued* before the summons is served (Woodward v. Stearns, 10 Abb. Pr. N. S., 395); but defendant may move to vacate it on further papers as he shall be advised.

HEYE against ROBERTSON.

New York Superior Court; Special Term, February, 1874.

COSTS IN ACTION FOR SPECIFIC PROPERTY.—SEVERAL DEFENDANTS.—SEPARATE BILLS.

In an action against two defendants for the recovery of specific personal property, where both appear and answer by the same attorney, they are not entitled to separate bills of costs, although they put in separate answers, and one has a dismissal of the complaint, and the other a judgment in his favor for the return of the property.*

Under section 306 of the Code of Procedure, allowing costs in certain actions in the discretion of the court, it is not for the court to determine what costs shall be awarded, nor whether there shall be one or more bills, but this is to be decided by the taxing officer in the first instance.

Ernest Heye sued Edwin R. Robertson and Samuel Winternitz to recover possession of personal property

^{*} See Stoddard v. Clarke, 9 Abb. Pr. N. S., 310.

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alleged to have been wrongfully detained from him by the defendants.

The action was tried by a referee, who dismissed the complaint as to the defendant Robertson, "with costs;" and rendered a separate judgment in favor of the defendant Winternitz, that he have a return of the property, with damages for the taking thereof in the action by the plaintiff, and also that he have costs.

The defendants appeared by the same attorneys,

but put in separate answers.

The clerk taxed a separate full bill of costs for each defendant.

From which taxation the plaintiff appealed.

J. K. Hill, for plaintiff.

Van Wyck & Green, for defendants.

Monell, Ch. J.—The specific award of costs to each of the defendants by the referee is supposed to have been authorized by section 306 of the Code. That section provides that "in other actions costs may be allowed or not at the discretion of the court. 2. In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them."

The preceding section 304 provides that costs shall be allowed of course to the plaintiff upon a recovery in the following cases: "2. In an action to recover the possession of personal property." And by section 305: "Costs shall be allowed of course to the defendant in the actions mentioned in the last section, unless the plaintiff be entitled to costs therein."

The decisions are conflicting in respect to the con-

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struction of these several sections. One, in the court of appeals (Decker v. Gardner, 8 N. Y., 29), holding in effect, that the defendants are entitled to costs as of course; and others (Bulkley v. Smith, 1 Duer, 704, and Williams v. Horgan, 13 How. Pr., 138), that they are in the discretion of the court.

But as the referee awarded costs specifically to each of the defendants, it is not material in this case which construction of the sections is correct. If the case was within section 305, then the defendants must have costs of course. If it is within section 306, they were in the discretion of the referee.

It is necessary to refer to these sections, however, to determine the material questions whether the defendants are entitled each to a bill of costs, it not being disputed that one bill is allowable.

The general current of decision has been against taxing two bills where the defendants have appeared and answered by the same attorney. (Castellanos v. Banville, 2 Sandf., 670; Colemb v. Caldwell, 1 Code R. N. S., 41; Bridgeport Ins. Co. v. Wilson, 12 Abb. Pr., 209; S. C., 7 Bosw., 699; Stone v. Duffy, 3 Sandf., 761). And I am unable to find any case where the right has been upheld. The construction by the courts of section 306 has not required that they should determine what costs or how many bills the defendants were entitled to tax, but merely that, in certain actions, costs were in the discretion of the court (See the eases of Bank of Attica v. Wolf, 18 How. Pr., 102; Wilklow v. Bell, Id., 397).

The court cannot, under that section, determine what costs a defendant shall receive, nor whether there shall be one or more bills. Costs, merely, are awarded, and then the taxing officer must decide, upon principles applicable to the question, what amount and what number of bills he will tax.

Therefore, in this case, the taxing officer was wrong

in not following the current and clear weight of authority that, under the circumstances of the case, there should be but one bill of costs.

All that is meant by subdivision 2 of section 306 is that, if one or more defendants succeed, he or they may, in the discretion of the court, have costs. It does not mean, nor can the court so award, that they shall or may have separate bills.

One of the taxed bills must be disallowed.

CAMBLOS against BUTTERFIELD.

New York Common Pleas; General Term, December, 1872.

Again, Special Term, March, 1873.

CAUSE OF ACTION.—ACCOUNTING.—PARTIES.—JUDG-MENT.—APPEAL.

The assignee of a claim, payment of which is refused by the debtor on the ground that it had been paid in his transactions with the assignors, to which transactions the assignee was a stranger, cannot maintain an action joining the debtor and the assignors as defendants, and seeking an accounting to ascertain the rights and liabilities of the parties and to have judgment against the one who may be found liable. His remedy must be either against the original debtor upon the claim assigned, or against the assignors for a breach of warranty.*

Where, in an action not on a joint liability, one defendant demurs, and the others answer, and the demurrer is sustained with costs, judgment may be immediately entered for the costs; and the time to appeal therefrom to the court of appeals will be limited to two years, irrespective of the litigation with the other defendants.

^{*} See Mann v. Fairchild, 3 Abb. Ct. App. Dec. 152, on the point that an assignment of a demand does not necessarily give a right to an accounting as to it.

The two years allowed for appeal is intended to afford means of appeal from such separate judgments in favor of several defendants as are authorized by the Code, and only within that period.

Demurrer to complaint; and motion to vacate judgment.

Henry S. Camblos, claiming by several mesne assignments, sued Frederick Butterfield, Samuel J. Wheeler, Orlando W. Joslyn, and John Y. Bostwick, to recover a demand of one hundred and sixty thousand dollars. He alleged that the defendant Wheeler had borrowed this sum of the defendant Butterfield, and that Butterfield had assigned the right to recover it to Joslyn and Bostwick, who in turn had assigned it to plaintiff. Wheeler had refused to pay, on the ground that the loan had been settled and paid in his transactions with the other defendants, and plaintiff accordingly joined them all, and asked an accounting to ascertain whether the loan ever had been repaid, and if so to which of his assignors, and that the plaintiff might accordingly recover it.

Stated in more detail, the allegations of the com-

plaint were briefly as follows:

That in certain transactions had between the several defendants, Butterfield, about February 25, 1867, lent Wheeler one hundred and sixty thousand dollars, to be repaid on demand. That, about April 21, 1869, Butterfield, representing the loan to be unpaid and still due, for value assigned his claim therefor to the defendants, Joslyn & Bostwick, of which Wheeler had immediate notice. That about August 4, 1870, Joslyn & Bostwick, being indebted to plaintiff, assigned to him (as collateral security) the same claim, together with any claim they had against Butterfield in respect thereto, or in respect to the assignment thereof, whereby plaintiff became entitled to collect the money

and apply it first to repay the debt due him from Joslyn & Bostwick, and then to pay the residue to Joslyn & Bostwick. Plaintiff then alleged that, on demanding payment from Wheeler, Wheeler refused to pay, on the ground, as he claimed, that the loan was included in the accounts of the aforesaid transactions between the defendants mentioned in the first allegation of the complaint, and was embraced in the settlement of those transactions, and paid and discharged thereby, "all of which the said Butterfield denies." That plaintiff had no knowledge of the accounts or settlement so alleged; and that if, on such settlement, Wheeler had paid the loan, plaintiff was entitled to recover the same from the defendant who received it.

Wherefore plaintiff demanded judgment that an accounting might be taken in respect to the transactions, in alleged settlement of which Wheeler claimed that his debt had been discharged, and that it might be ascertained to which of defendants, if any, the money or any part of it had been paid, and that plaintiff might accordingly recover the same.

December, 1872. Demurrer to complaint. The defendant Butterfield demurred on the grounds: first, that several causes of action were improperly united; second, that the complaint did not state facts sufficient to constitute a cause of action against him.

The demurrer was sustained at special term, the following opinion being rendered.

ROBINSON, J.—The demurrer taken by the defendant Butterfield, must be sustained on the ground that the complaint does not state facts sufficient to constitute any cause of action against him. His liability to the plaintiff can only arise through breach of his warranty of title to the debt of one hundred and sixty thousand dollars, asserted in his assignment thereof to

Joslyn & Co., to be due him from the defendant Wheeler. The complaint alleges the assignment to him by Joslyn of this debt, and of Butterfield's warranty, as collateral for a debt of twenty-six thousand seven hundred and forty-five dollars and sixty cents, due him by Joslyn & Co. He fails to assert any breach of Butterfield's warranty, but simply alleges that Wheeler refused to pay the debt, on the ground, as he claims, that the same was included in the accounts of certain transactions theretofore had between Butterfield, Joslyn, Bostwick and himself, and were embraced in a settlement of such transactions, and that in such settlement his debt to Butterfield was paid and discharged, "all of which the said Butterfield denies."

Joslyn & Bostwick, as well as Wheeler, are made parties, and the complaint prays for an accounting in respect to such transactions, to determine whether Wheeler's debt had been paid, when, and to whom; and that he may recover the debt of one hundred and sixty thousand dollars, and interest. This presents no case for involving Butterfield in such a controversy. If he is at all liable on his warranty, or for collecting moneys he had already assigned, he can only be made so in an action founded on his express or implied agreement, and where his breach of contract is alleged with legal precision; and the fact that he has, to any and what extent, so interfered with the rights of his assignee and broken his agreement, is one resting in the simple proof what he had done on any such alleged settlement, and in what manner he had impaired the integrity of the claim against Wheeler.

The trial of the question involves the taking of no account, but is one of fact, as to which he has a right to trial by jury, of which he cannot be deprived by being involved in the quasi equitable case for an accounting

sought to be made by the complainant.

No equitable remedy upon or in respect to his legal

obligation can be be enforced against him. No claim at law is asserted against him, nor is any case for the interposition of a court of equity presented, rendering it proper or necessary for him to be subjected to its jurisdiction in respect to the matter of discovery sought by the complaint as to the precise amount of Wheeler's liability, and when and to whom it was paid, adjusted or settled. The case stated would not, under the former practice, have furnished ground for a bill of discovery of the matters the plaintiff seeks to have ascertained and determined, and under the Code (§ 399) the bill of discovery being abolished, he has no standing in court for any relief against the defendant Butterfield.

The complaint should be dismissed, with costs, as against Butterfield.

Plaintiff appealed to the general term.

John E. Burrill, for the plaintiff, appellant.—I. If there is a cause of action against Butterfield, he cannot demur that Joslyn and Wheeler are improperly joined. New Haven Case, 17 N. Y. 593; Bank of Havana v. Maghee, 20 N. Y. 359; Allen v. City of Buffalo, 38 N. Y. 280.

II. The only question is, is Butterfield a proper party. Plaintiff is not bound to show that he is a ne-

cessary party.

III. Under sections 118 and 120 of the Code, Butter-field, the assignor, may be joined, for, if a payment has been made after Butterfield's assignment, Wheeler will not be protected, but would be entitled to be subrogated to a claim over against Butterfield. The latter is a necessary party in order to make the judgment binding on him, and he is a proper party in order that he may protect his own rights; and joining him tends to put an end to the issue.

IV. The demurrer admits allegations showing that

an accounting is necessary to determine whether the debt is due, and Butterfield is a necessary party to the accounting.

V. The action does not necessarily prevent trial by jury, nor, if it did, is that a reason why it should not be sustained.

VI. The cause of action against Butterfield is not merely one for breach of warranty, which refers to the time of the assignment. He is charged with collecting money after the assignment.

Andrew Boardman, in support of the demurrer.—
I. This action is not sustainable, because it is a suit expressing a doubt as to which of two parties is liable to pay a certain sum of money, and asking a discovery and accounting to determine that question, and judgment against one or the other, as the facts may appear.

II. The liability of Butterfield can only arise through breach of warranty; which is not alleged.

III. If liability exists, it is to an action at law in which he has the right of trial by jury. Hudson v. Caryl, 44 N. Y. 553. In no respect is it proper to join Butterfield with the other parties as defendant. Plaintiff has no right to bring the suit to discover whether what Wheeler says is true or false. Code, § 399; Story's Eq. Pl., §§ 311, 312. The action cannot be maintained as one for an account. Lond. Jur., March 26, 1859; quoted with approval by Story Eq. Jur., 459 a. note 1; Phillips v. Phillips, 9 Hare, 471; Padwick v. Hurst, 18 Beavan, 575; O'Connor v. Spaight, 1 Sch. & Lef., 305; Foley v. Hill, 2 H. L. Cas., 28; Navulshaw v. Brownrigg, 2 De G., M. & G., 441; Story's Eq. Jur., 8th ed., § 59, 64 c., 456, 458, 458a, 459. As to misjoinder, see Code, § 144; Malone v. Stilwell, 15 Abb. Pr., 425; Valentine v. Lloyd, 4 Abb. Pr. N. S., 371. But even if a case for an account were made out against the other parties, Butterfield, the assignor, could not be

made a party to it. Allen v. Smith, 16 N. Y., 415: Ward v. Bokkelin, 2 Paige, 289; Miller v. Bear, 3 Paige, 466; Voorhees v. Childs, 17 N. Y., 354.

IV. It is nowhere alleged, that the settlement, whatever it may have been, was made after the assignment to the plaintiff. Furness v. Ferguson, 15 N. Y., 437; Reeves v. Kimball, 40 N. Y. 299.

V. Sections 118 and 274 do not warrant this action. Wells v. Smith, 7 Abb. Pr., 263; Tracy v. Steam Faucet Co., 1 E. D. Smith, 365.

By the Court.*—Daly, Ch. J.—The demurrer interposed by Butterfield in my judgment was properly sustained, and I have nothing to add to the reasons given by Judge Robinson below.

Judgment affirmed, with costs.

March, 1873.—Motion to set aside judgment. After the foregoing demurrer had been put in, but before argument, the defendants Wheeler, Joslyn and Bostwick respectively answered. Pending the prosecution of the cause as against the answering defendants, the defendant Butterfield had the judgment rendered as above stated in his favor, entered with the clerk, and a judgment roll filed, and his costs taxed.

This judgment, plaintiff now moved to vacate.

Robinson, J.—Upon the separate demurrer to the complaint interposed by the defendant Butterfield judgment was rendered for him, with costs, and this decision was on appeal affirmed by the general term. On the trial the question was raised as to the right of Butterfield, one of the several defendants, charged with no joint liability, upon judgment in his favor on demurrer, to an immediate recovery of his costs, and this

^{*}Present, Daly, Ch. J., and LARREMORE and J. F. Daly, JJ.

was adjudged in his favor, and reaffirmed by the general term. Such adjudication was made upon construction of section 274 of the Code, as to the right of defendant to such a separate judgment in his favor, and its efficacy as a final determination of the controversy between him and the plaintiff cannot be gainsaid on the present motion.

Plaintiff now asks to have the entry of such judgment vacated as irregular, on the ground that it does not dispose of all the merits of the suit, and that its entry may prevent his appeal to the court of appeals, from any such adverse judgment that may be rendered against him in the future litigation with the other defendants, as may be delayed beyond the two years allowed for appeal from a final judgment, which he ·claims relates to a determination of the entire controversy between all the parties. In this I think he errs, and that the two years allowed for appeal is intended to afford means of appeal from such separate judgments in favor of several defendants as are authorized by the Code within that period, but is inoperative as to such as had been entered in favor of one or more of the adverse parties at longer periods. The separate judgment rendered on this demurrer entailed no further consequences than the enforcement of payment of the costs of this defendant: but so far as the merits of the controversy were concerned, the plaintiff (if his views as to the effect of a separate entry of judgment. are correct) had yet at least two years to conclude the residue of the litigation, and thereupon bring his appeal from this judgment, as well as from such others as may be rendered against him in favor of any of the other defendants. If his remedy by way of appeal from this judgment should be cut off by lapse of the statutory time, no argument from its inconvenience or hardship can be entertained, and no stay of proceedings, in such a case, from any anticipated apMoses v. Waterbury Button Co.

peal is provided for in the Code. This separate judgment enforcing the immediate payment of the costs of the defendant cannot be modified or impaired by an order to the contrary.

Plaintiff, if injured, has his only redress through an appeal taken within two years, and order for restitution.

Motion denied, with ten dollars costs.

MOSES against THE WATERBURY BUTTON COMPANY.

New York Superior Court; Special Term, December, 1873.

ATTACHMENT.—JUSTIFICATION OF SURETIES.

Under section 241 of the Code of Procedure, as amended in 1869, when an undertaking is given to obtain the discharge of an attachment, it is the duty of the sheriff, notwithstanding the exparte approval by the court of an undertaking, to retain possession of the property until there has been an opportunity for the justification of the sureties.

This is matter of substantial right, which plaintiff does not waive by a verbal consent to the entry of the order for discharge; and such an order allowing a surrender of the property without a justification of the sureties or a waiver of the right to object, is erroneous, and will be corrected on motion.

Israel W. Moses sued the Waterbury Button Company and obtained an attachment against property issued as a provisional remedy under the Code. The defendant, having given the usual undertaking to procure a discharge, entered an order thereon by plaintiff's verbal consent, which order plaintiff now moves to

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correct so as to save his right to except to the sureties and have them justified before the delivery of the property.

FREEDMAN, J.—Under sections 240 and 241 of the Code, as they stood prior to 1869, a defendant, after appearance in the action, could apply ex parte for the discharge of the attachment. Upon such application he was bound to deliver to the court or officer who had issued the attachment, the undertaking required by section 241, and upon compliance with this provision and the approval of the undertaking by such court or officer, an order was made discharging the attachment. It thereupon became the duty of the sheriff, without express directions contained in the order to that effect, to deliver or pay to the defendant or his agent all the proceeds of sales and moneys collected by him under the attachment, and all the property attached, remaining in his hands. The plaintiff was not entitled, as matter of right, to notice of any of these proceedings.

By an amendment of section 241 passed in 1869, it

was, however, provided as follows:

"And the plaintiff may, within three days after receiving written notice of the filing of such undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objection to them. When the plaintiff excepts, the sureties shall justify on notice in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, and may retain possession of the property attached, and the proceeds thereof in his hands, until the objection to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justify."

Under this provision it is the duty of the sheriff to retain possession of the property attached, notwith-

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standing the ex parte approval of the undertaking by the court or officer on granting the order for the discharge of the attachment, until all objections to the sureties on plaintiff's part are either waived or the undertaking be reapproved on justification of the sureties; and any positive direction to the contrary which may be incorporated into the order of discharge, is erroneous. The provision referred to secures to the plaintiff a substantial right, of which he cannot be deprived. The verbal consent of the attorney for the plaintiff to the entry of the usual order for the discharge of the attachment in this case cannot, therefore, be construed into a waiver of the plaintiff's right to except to the sufficiency of the parties, or to their justification.

The order of December 24 must be modified by striking out the words "and that all the property attached thereunder by the sheriff of the city and county of New York remaining in his hands be delivered to the defendants or their agents, and released from said attachment."

BERRIAN against MAYOR, &c. OF NEW YORK.

New York Superior Court, Special Term; October, 1873.

COUNTER-CLAIM.—CAUSE OF ACTION.—TORT AND CONTRACT.

In an action on contract, it is not admissible to set up as a counterclaim that plaintiff had fraudulently induced defendant to pay moneys falsely claimed under the contract, in excess of the true Berrian v. Mayor, &c. of New York.

value of the work, and to demand a repayment. To render these facts available as a counter-claim, the tort must be waived, and the recovery of the moneys overpaid be sought as on an implied contract, and the answer must set forth facts showing defendant's election to proceed on the implied contract and not for the wrong.

Daniel Berrian sued the defendants on a contract for work and materials.

The defendant, by way of counter-claim to each of the causes of action set forth in the complaint, averred that the plaintiff, willfully, and for the purpose of deceiving, cheating and defrauding the defendant, made a false claim as to the amount and value of certain materials and work delivered and performed by him to and for the defendant, and that he conspired with Cooke, the deputy superintendant of repairs of the defendant, and with Tweed, their commissioner of public works, to cheat and defraud the defendants; and that by such means, and with the intent to cheat and defraud, he procured, from said officials, certain certificates, which he knew to be false as to the amount and value of the work and materials, upon which he obtained, from the defendants, moneys largely in excess of the just and true value of the work and materials.

It was then alleged that the defendants were deceived and induced to pay said sum of money to the plaintiff by his false claim and representations, and by the false and fraudulent certificates of Cooke and Tweed.

Plaintiff demurred to the counter-claim.

Mr. Lawrence, for plaintiff.

Mr. Deane, for defendant.

VAN VORST, J. [After stating the facts.]—The defendant's counter-claim as pleaded constitutes a tort.

The wrong does not arise out of and is not connected with the claim set up in the complaint. It is an inde-

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pendent cause of action, and for which the plaintiff is liable to arrest and imprisonment. It may be that the defendant could have set up his claim for the moneys overpaid the plaintiff in such form as to waive the tort and seek a recovery back of the moneys overpaid by way of counter-claim, on an implied contract to refund the same. But in such case the pleadings should set forth facts showing the defendant's election to proceed on the implied contract, and not for the wrong.

In Coit v. Stewart (12 Abb. Pr. N. S., 216, and 50 N. Y., 17), it was held in a case of conversion of personal property, that the party has his election to sue for the breach of the contract, or for the conversion, and if he elects to proceed for a breach of the contract he may interpose it as a counter-claim in an action upon contract brought against him by the one who had converted the property.

In De Graw v. Elmore (50 N. Y., 1), it was substantially decided that where a complaint alleges facts showing a cause of action in tort, a recovery cannot be had by proving upon the trial a cause of action in contract.

In Ross v. Mather (51 N. Y., 108), it was held that in an action where fraud is the basis of the complaint a recovery cannot be had for a breach of contract.

Section 150 of the Code, subdivision 2, provides that in an action arising on contract any other cause of action arising also on contract and existing at the commencement of the action may be interposed as a counter-claim. The counter-claim here set up is alleged to have originated, not in a breach of contract, but in a design to cheat and defraud the defendants.

The demurrer is well taken, and judgment thereon is ordered in favor of plaintiff, with liberty to the defendant to amend his answer in twenty days, on the usual terms.

McRoberts v. Winant.

McROBERTS against WINANT.

Supreme Court, Second District; Special Term, February, 1874.

STATUTES.—COUNTY TREASURER'S BOND.

Statutes fixing the time for public officers to file official bonds are directory.

A county treasurer may file his bond at any time before entering upon the duties of his office.

Hugh McRoberts was elected treasurer of Richmond county in November, 1873, and took and filed his oath of office December 2 following. The annual meeting of the supervisors was held on October 25, 1873. The official bond of McRoberts was dated December 29, 1873, and acknowledged and delivered to the supervisors January 14, 1874. It was approved by them January 22, and was filed in the Richmond county clerks office January 23, 1874. On his application to his predecessor, Mr. Winant, possession of the books and papers of the office was refused; and thereupon an order to show cause was obtained under the statute, why delivery should not be compelled.

S. F. Rawson. showing cause for Winant, argued:
—That the act of 1850, ch. 346, § 3, applies. The bond not being filed in time (act of 1850, § 1), the office was vacant (1 Rev. Stat., 5 ed., p. 413). The general statutes do not apply, as there is a different time prescribed (1 Rev. Stat., p. 411, § 25 and act of 1850), and even under the revised statutes the office is still vacant, the bond not having been filed until after January 15. McRoberts not having duly filed his bond, Winant's sureties would be liable (1 Rev. Stat., § 34, p. 412), for turning over the papers to McRoberts.

- T. Westervelt, for McRoberts, argued:—That the act of 1866 (ch. 696), prescribed no time, and that the bond might be filed at any time before entering upon the duties of the office—at all events, the statutes (1 Rev. Stat., p. 409, § 14), did not authorize Winant to hold over.
- J. F. Barnard, J.—Held that the statute must not be so construed as to defeat the will of the people as expressed at the election, and that the provision fixing the time for filing the bond might be held to be directory. The bond having been approved by the supervisors, and filed in the clerks office, although after the time prescribed therefor, was a valid bond, and authorized McRoberts to take the office. That notwithstanding 1 Rev. Stat., p. 412, § 34, the defendant could not contest McRobert's title, as he did not come within the statute authorizing officers to hold over.

Order for delivery of books, &c., granted.

HEADY'S WILL.

Before the Surrogate of Westchester County; June, 1873.

ATTESTATION OF WILL.

Under 2 Rev. Stat., 63, § 40, the subscribing witnesses of a will, as well as the testator, must put their signatures at the end of the will. Where the signatures of the witnesses, apparently by mistake in turning over the paper, were put on a blank page in the middle of the will,—Held, that the will was not duly executed.*

^{*} The requirements of the existing statute (2 Rev. Stat., 63, § 40; 3 Rev. Stat., 5 ed., 144), as its construction is now settled, are as follows:

It seems, that a will in which a whole page is left blank intervening in the midst of its disposing parts is not duly executed, at least, unless a line is drawn across the page so as to preclude fraudulent additions.

Every will (except nuncupative wills) must be executed and attested in the following manner, and the attestation must be completed before the testator's death (Vernam v. Spencer, 3 Bradf., 16).

- 1. It must be subscribed by the testator at the end of the will. But a seal is not necessary (Matter of Diez, 50 N. Y., 88; affirming 56 Barb., 591; 1 Rev. Stat., 736, § 119). A moderate blank space, -e. g., four inches,-between the last line of the will and the signatures, is not fatal (Matter of Gilman, 38 Barb., 364); nor is the fact, that while the testator's seal was affixed in the usual place for signature above the attestation clause, his subscription was written in proximity to those of the witnesses, below that clause (Cohen's Estate, 1 Tuck., 286); nor is the fact that the testator annexes to, and refers to, in his will, another instrument not duly attested (Tonnele v. Hall, 4 N. Y., 140; affirming 5 N. Y. Leg. Obs., 254; Thompson v. Quimby, 2 Bradf., 449); nor the fact that, after due execution and attestation of a complete will, he adds other directions without attestation, which are such as may be rejected without impairing the will (Conboy v. Jennings, 1 Supreme Ct. R., 622). But a separation of material parts of the will is fatal,—as where, after the usual subscription of the testator, the appointment of executors was underwritten and signed by the witnesses only, and then a further direction to the executors was underwritten, signed by the testator only, -in such case, the will is not duly executed (McGuire v. Kerr, 2 Bradf., 244).
- 2. Such subscription must be made by the testator in the presence of each of at least two witness, or must be acknowledged by him to have been so made to each of such attesting witnesses, or to such of them as were not present at the making of the subscription (Lyon v. Smith, 11 Barb., 124; Carroll v. Norton, 2 Bradf.. 291, holding that presence of, or acknowledgment to, two witnesses is enough, notwithstanding there are more witnesses; Tonnele v. Hall, 5 N. Y. Leg. Obs., 254, holding that subscription in presence of one, and acknowledgment to another, are sufficient).
- 3. The testator, at the time of making such subscription, or at the time of acknowledging the same,—or both, if subscribed in presence of one, and acknowledged after subscription to the other—must declare in the presence of each witness, that the instrument is his will (cases above cited; Vaughn v. Burford, 3 Bradf., 78; Carle v. Underhill, 3 Id., 101; Doe v. Roe, 3 Barb., 200; Gamble v. Gamble, 39 Id., 373).
- 4. Each of the two attesting witnesses must sign his name as a witness at the end of the will, at the request of the testator.

A paper purporting to be the last will and testament of Lazarus Heady, deceased, was offered for probate, and was contested by the heirs at law and next of kin on various grounds, the chief one being that it had not been duly executed. The alleged will was written on a sheet of legal-cap paper and occupied the first and third pages, the second page being left blank, as also the fourth The testator's name was subscribed and his mark made on the second line from the bottom of the third page, which second line was that next following the line containing the last words of the will. The scrivener would seem to have folded the sheet, after writing the first page, so as to bring the first against the fourth page of the sheet. Then, after writing the third page, he appears to have turned the sheet directly over without unfolding it, and there, on what was thus apparently the top of a blank page, to have written the usual attestation clause, which was there subscribed by the witnesses. This clause thus appears bottom upwards upon the second page of the paper. There was a space of seven-eighths of an inch between the last words of the will and the bottom of the third page,

^{5.} Any or all of the acts hereinbefore required of the testator may be done by another person in his presence, and with his direction or manifest approval (Robins v. Coryell, 27 Barb., 557; Campbell v. Logan, 2 Bradf., 90; Van Hanswick v. Wiese, 44 Brab., 494; Tunison v. Tunison, 4 Bradf., 138; Whitbeck v. Paterson, 10 Burb., 608; Coffin v. Coffin, 23 N. Y., 9; Smith v. Smith, 40 How. Pr., 318, reversing Id., 134; Rutherford v. Rutherford, 1 Den., 33; Brown v. Decelding, 4 Sandf., 10; McDonald v. Loughlin, 20 Barb., 230; Hollenbeck v. Van Valkenberg, 5 How. Pr., 281; Matter of Gilman, 38 Barb., 364; Peck v. Cary, 27 N. Y., 9; affirming 38 Barb., 77; Gilbert v. Knox, 52 N. Y., 125).

^{6.} The order in which the foregoing acts are mentioned by the statute is not in itself imperative, if the declaration be made at substantially the same time as the subscription in presence of the witnesses, or the acknowledgment of the subscription to the witnesses (Doe v. Roe, 2 Barb., 200; Keeney v. Whitmarsh, 16 Id., 141).

affording sufficient room for the witnesses to have written their names.

- D. W. Travis, for proponents,—Cited, McGuire v. Kerr, 4 Bradf. Sur., 244.
- D. S. Herrick, for Maria Weir, a legatee,—Cited, In re Baker, Prerog. T. T., 3 Notes of Cases, 162; In re Gore, 3 Curteis, 758; 1 Tucker, 286.
 - F. Larkin, for heirs, &c.,—Cited, 2 Rev. Stat., 63.

The Surrogate.—The subscribing witnesses, by their testimony, show that the requirements of the statute were complied with in so far as the signing of the alleged will by the decedent, the publication, and the request to them to sign as witnesses, are concerned, and although an attempt was made to show the decedent incompetent, it was unsuccessful. The only question, therefore, to be considered, is whether the signatures of the subscribing witnesses are so placed as to meet the requirements of the statute. The statute, which has remained unaltered since the revision of 1830, requires that the will shall be subscribed by the testator at the end thereof, and there shall be at least two subscribing witnesses, each of whom shall sign his name as a witness at the end of the will.

Doubtless, every one has the same natural right to direct what disposition shall be made of his property after his death, that he has to dispose of it while living. This natural right was recognized at a very early age of the world, and has been practiced from time immemorial,* at first unrestricted, but in consequence of force, fraud and imposition employed toward the weak and dying, it became necessary to guard and protect persons in the exercise of this natural right, by legislative enactments. These laws, passed from time to time,

^{*} But see Maine's Ancient Law, ch. 6.

both here and in England, became more and more stringent and technical in their provisions, according as observation developed the necessity, until the adoption of our present statute in 1830, and the act of parliament 1 Vic., ch. 26), in 1837 in England. Our statute, it will be seen, has remained intact for upwards of forty years, and, while our courts have generally adhered to a strict and literal construction of its provisions, no modification of it has, that I am aware of, ever been attempted; a sufficient evidence, one would suppose, of the beneficence of its requirements, as well as of approval of its strict construction by the courts.

The mode of execution of wills as prescribed in our statute and the act of parliament (1 Vic.), is identical in respect to signatures, except that while ours provides that the testator shall sign "at the end of the will," the English act provides that he shall sign "at the foot or end of the will;" and also that here the witnesses must each sign at the end of the will, the English statute, while requiring two witnesses to be present at

the time, is silent as to where they shall sign.

In England, under the statute (1 Vic.), the ecclesiastical courts adopted such a construction of the words "at the foot or end thereof," by requiring that the signature of the testator should immediately follow the written words of the will, so that no space should remain whereon anything more could be written, that it was deemed necessary to pass an additional statute defining the import of these words more carefully. Hence the act (15 and 16 Vic., ch. 24, 1852-'3), commonly called "St. Leonards' Act," which provides that the signature of the testator shall be valid "if so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect, by such his signature, to the writing signed as his will," "and that no such will shall be affected by

the circumstance that the signature shall be on a side, or page, or other portion of the paper or papers containing the will, whereon no clause, or paragraph, or disposing part of the will shall be written above the signature."

Several decisions have been made under this defining act; one (In re Hammond, 9 Jur. N. S., 581), rejecting a codicil; another (Hunt v. Hunt, Law Rep., P. & D., 209), where a will ended in the middle of the third page, and, the lower half of this page remaining blank, the attestation clause and the signatures of the testator and the witnesses were at the top of the fourth page, and it was held a sufficient execution. And so, where the will filled the first and third pages of a sheet of paper, and the signatures were written crosswise on the second page, it was held sufficient (Cooms, In re, Law Rep., P. & D., 302).

These decisions are all, doubtless, correct under the defining statute above quoted. In the absence, however, of any such statute in this State, we are compelled to regard the decisions of our own courts in analogous cases, and to construe our statute so as to give effect to the intent and meaning of it, as gathered from the language used, and the causes which gave it origin.

In the goods of Baker (Prerog. Ct., 1844, 3 Notes of Cases, 162), decided under the statute 1 Vic., the will was written on paper folded in the middle, so as to make four pages (foolscap), and it began on the first page and was continued and concluded on the third page, on which there was no signature, although there was room for the name of the testator, but not for the attestation clause, which was written on the lower part of the second (otherwise blank) page, and underneath it were the signatures of the testator and witnesses. The learned Sir H. Jenner Fust admitted the will to probate. The testator and witnesses all concurred as to the end, in that case. Here, however, their names

are more than the distance of a page apart (McGuire v. Kerr, infra). That court subsequently adopted a more stringent rule of construction, under which probate would have been refused.

In the goods of Gore (3 Curteis, 759), was decided. in 1843, under the same statute, and, it seems to me, determines a different question than the one under discussion, but which might properly give rise to some consideration. In that case, the will occupied the entire side of the first page of a sheet of paper (doubtless, "foolscap"), closing with the words: "I have hereunto set my hand and seal." The second side was left blank, and on the third side was a full attestation clause, and at the foot or end thereof were the signatures of the testator and the subscribing witnesses. Sir Herbert Jenner Fust concludes his brief opinion by saying: "It cannot be said to be signed at the foot, but it may be said to be signed at the end." It appears to me that all that is substantially decided, is that the intervention of a blank page will not invalidate a will, where the will purports to dispose of the whole estate. It is a matter of much doubt whether our courts can properly sanction such wills, when it is considered that the great object of our statute is to guard against fraud, and when so wide a door is left open for its perpetration, as is done by leaving a blank page intervening in the midst of the disposing parts of a will. Indeed, in later cases in England, the same learned judge, with the concurrence of the judicial committee of the privy council, has felt it necessary to take a more rigid view of the enactment in question, even where there was no intention to evade the law, but on the contrary, where the testator was anxious to comply with the requirements of the statute (Willis v. Low, 5 Notes of Cases, 428; Smee v. Bryer, 6 1d., 20; affirmed in privy council, 1848). If the blank page had had a line or lines drawn lengthwise across it, the objection

would have been obviated. Careful conveyancers almost invariably adopt that mode of marking blank spaces. As the question, however, has not been raised in this case, it has received little consideration, and is not passed upon.

The case in 1 Tucker, 286, but follows that in 3 Curteis above referred to, in so far as the signing by the testator at the foot of the attestation clause is con-

cerned.

VERPLANCK, Senator, in Remsen v. Brinckerhoff (26 Wend., 325), which is the leading case under our statute, says: "The requirements of the statute are the prescribed rules for the evidence, pronounced by law to be indispensably necessary to prove the disposing mind and will of the testator, and the authenticity of the testament; both of these being subjects peculiarly open to imposition, artifice and error. The law therefore prescribes, amongst other things, that the will shall be subscribed by the testator at the end of the will, and there shall be at least two subscribing witness, each of whom shall sign his name as a witness at the end of the will. The rule is strict in regard to the place where the testator and witnesses shall sign, prescribed by precautionary policy for the government of those who alone can give legal effect to the testament."

The presumption is that the statute, by using the word "end," means to give it its usual signification—termination. In order to reach the termination, or end of a written document, we must turn over the leaves, on which it was written, in the ordinary and usual way. We have no right, arbitrarily, to use an extraordinary method to reach a point in the middle of the document, which was designed, through ignorance or error, to be the end. Such a course would be, in effect, for the court to legislate, as parliament did in the defining act referred to.

The learned surrogate, in the case of McGuire v. Kerr (2 Bradf., 244), held that the statute meant that the testator and witnesses should all agree, by the act of placing their names doubtless, as to what is the "end of the will." Here they did not so concur. The testator signed at the foot of the third page, and the witnesses signed on the second page. A will has its beginning and end—both local. Surely, there cannot be two ends; one on the third page, and the other in the midst, locally between the first and third pages.

It is claimed that the courts, in the absence of all appearance of fraud, such as this case presents, have considered whether the admission or rejection of the will would accomplish or defeat the intent and meaning of the statute, and have invariably acted accordingly. It certainly cannot be claimed that a will, however honestly intended to have been properly executed, and however free from any suspicion of fraud, where the witnesses signed before the testator subscribed it, should be admitted to probate (Jackson v. Jackson, 39 N. Y., 153); nor that one with like surroundings, subscribed by the testator and signed by the witnesses upon the margin of the second of three written pages, could be recognized by any court as a valid will. Hoysradt v. Kingman (22 N. Y., 372), the court says: "Under the statute of frauds, it had been held that the name of the testator, written by himself, occurring in any part of the instrument, was a sufficient signing. Our modern statute is careful to change this rule by requiring the subscription to be made at the end of the will;" and it requires the witnesses to sign at the same place.

I cannot resist the conclusion that the will in question has not been signed by the witnesses at the end thereof, and it must, therefore, be refused probate.

met 18:

Hayes v. Thompson.

HAYES against THOMPSON.

Supreme Court, Fifth District; Special Term, July, 1873.

JUROR.—CHALLENGE.—MOTION FOR A NEW TRIAL.

A verdict should not be set aside on the ground that one of the jurors was disqualified by consanguinity to a party, unless it be shown that injustice has been done.

Irving Hayes sued Schuyler C. Thompson, and recovered judgment, on a verdict at the circuit. The defendant now moved to set aside the verdict on the ground that one of the jurors was a cousin of the plaintiff, a fact which was not known to the defendant until after the trial was had.

Walter Ballou, for motion.

H. W. Bentley, opposed.

Hardin, J.—The juror, upon a challenge to the poll, could have been held incompetent to sit in this case, and such challenge might have been interposed, with time and opportunity to make the proof necessary to sustain the challenge (Wakeman v. Sprague, 7 Cov., 721).

Such a challenge is in the nature of a pleading. An issue may be framed, and the decision upon it may be reviewed (6 Cow., 55; 7 Id., 108; 4 Wend., 229).

Besides, it is settled that a challenge to a juror does not go to the jurisdiction of the court (Clark v. Van Vranken, 20 Barb., 281), and in this last case it is said, "And the challenge must be made before the trial,

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otherwise the right to make it is waived" (Opinion of STORY, J.).

If the objection went to the jurisdiction of the court, as in case of the relationship or affinity of the judge, the rule would be otherwise (20 Barb., 281).

In case of the affinity or consanguinity of a party to the court, there would be no jurisdiction, and the judgment would be absolutely void (41 Barb., 200; 1 Abb. Ct. App. Dec., 341; 17 Barb., 410; 21 Wend., 64; see note to Jewell v. Albany City Bank, 1 Clark Ch., 188, new ed. of 1869, with notes).

It has been held that the sitting of jurors, not regularly summoned, disqualified by age, being infirm, destitute of property qualifications, being unnaturalized aliens, do not vitiate the verdict.

That if the objection be not taken in time it is waived, especially when it does not appear that injustice was produced, even in cases where the objection was not known before the trial (Burnett v. Matthews, 40 How., 434; and cases cited in opinion of DANIELS, J.; Code, § 176).

Great latitude is allowed at the circuit, in procuring a jury, for a party to determine what jurors are qualified and indifferent between the parties (3 Rev. Stat., 5 ed., 718). Parties who do not avail of that latitude, and the rules established to secure as jurors persons who are strictly qualified, in the absence of proof that injustice has been done, should be held to waive objections or causes for challenge which might have been ascertained with diligence (6 Wend., 388; 17 Johns., 133; 7 Cow., 478; 1 Seld., 531.) No such injustice is shown in this case, and the motion to set aside the verdict is denied, with ten dollars costs.*

^{*}At general term, in the fourth department, January, 1874, present, Mullin, P. J., and Gilbert and E. D. Smith, JJ.,—this order was affirmed.

O'BRIEN against THE MECHANICS' AND TRADERS' FIRE INSURANCE COMPANY.

Court of Appeals; February, 1874.

Reversing 14 Abb. Pr. N. S., 314.

ATTACHMENT.-MANNER OF LEVY.

Under section 235 of the Code of Procedure,—as to attachment of property, &c., of a debtor in the hands of a third person,—a general notice that all the property, debts, &c., of the defendant in the action, in the possession or control of the person served with the notice, and with a copy of the attachment, is sufficient.

It is optional with the sheriff whether he will limit his levy, by specifying in the notice particular property.

Drake v. Goodrich, 54 Barb. 78, and Clark v. Goodrich, 41 N. Y., 210, explained.

This action was brought in the name of the plaintiff, sheriff of New York, to recover insurance moneys, on a policy issued by defendants to one E. S. Candler, Jr. Candler's creditors had attached his property and things in action, and the sheriff served on defendants, a copy of the attachment, with a notice in general terms, that he attached all the property, money, bank notes, books of account, vouchers, debts, credits and effects of Candler, in their possession. The present action was then brought, for the benefit of the creditors, they having given the bond required by law.

The superior court held that a general notice was insufficient; that the particular property or debt to be reached must be specified (reported in 14 Abb. Pr. N. S., 314).

Plaintiff appealed.

L. K. Miller and Wm. W. Badger, for the attaching creditors, appellants.

A. J. Vanderpoel, for the sheriff.

Geo. W. Parsons, for respondents.

BY THE COURT.—ALLEN, J.—The plaintiff was turned out of court and his complaint dismissed, solely upon the ground that the attachment had never been levied upon the claim in contention, and that for want of such levy, the plaintiff had no title to the same, and was not entitled to maintain an action for its recovery. Two other grounds were suggested by the defendant in his application to dismiss the complaint, but neither were considered or passed upon by the court, and neither can be said, even if decided adversely to the plaintiff upon the case as made upon the trial, to be conclusive upon the right of the plaintiff. The objections are capable of being obviated and overcome by other and further evidence; and, that being the case, the defendant cannot have the benefit of them upon this appeal. It is only when the record discloses an insuperable difficulty to a recovery by the plaintiff, that a judgment against him will be sustained if the court below erred in the decision actually given. The only question before us is, whether the notice left with the defendant, at the time of leaving the certified copy of the attachment, was a sufficient compliance with section 235 of the Code, and a valid attachment of the claim now sued upon. We are not seriously embarrassed by authority, and the question as now presented may properly be considered as res nova.

The supreme court in the first district, and the superior court of the city of New York, where, only, so far as appears, the question has arisen, have differed in their interpretation of the statute, and the duty of

the sheriff under it, and there is no settled or authoritative practice under this conflict of authority (Kuhlman v. Orser, 5 Duer, 242; Wilson v. Duncan, 11 Abb. Pr., 3; Greenleaf v. Mumford, 19 Id., 469; Drake v. Goodridge, 54 Barb., 78). In this court but two cases need be referred to (Kelly v. Roberts, 40 N. Y., 432, and Drake v. Goodridge, 41 Id., 210). In Kelly v. Roberts, with a copy of the attachment, the sheriff left a notice with the defendant Roberts, that all the property, effects, rights, &c., and the debts and credits, of the debtors in the attachment, then in his possession or under his control, would be liable to the warrant of attachment, and he was required to deliver all such property, &c., into the custody of the sheriff without delay. After an examination of Roberts, under section 236 of the Code, a new notice was served, adding to the first notice a particular statement of the claim intended to be levied upon, and to recover which the action was brought. Other questions divided the court, and were considered at length, and the only allusion to the service of the attachment is the brief remark of Judge James, that he thought the service sufficiently identified the debt sought to be recovered. Drake v. Goodridge turned upon the question whether the particular securities which were in controversy, and the interest of the debtor therein, had been levied upon by the sheriff, and Judge Hunt in his opinion considers the sufficiency of a general notice, similar to that served by the sheriff in this instance, and comes to the conclusion that such a notice is not a compliance with the statute requiring the notice to show the property levied on.

Four judges concurred with Judge Hunt in reversing the order appealed from, and two were for an affirmance.

Upon what precise views the four concurring judges arrived at the same result with Judge Hunt does not

appear. The reporter does not state that they concurred in the opinion. The report states that Judge GROVER also read an opinion for a reversal. This is a mistake. His opinion was in Clark v. Same defendants, argued at the same time, and is reported in 44 How. Pr., 228, and the dissenting opinion of Judge DANIELS in the Drake suit, concurred in by Judge James, is also reported in the same book at page 234. The notice of the sheriff served with the attachment was essentially different from that before us, and after the general clause stating, &c., not that he attached, but that all the debts, credits, &c., of the defendant in the attachment would be liable to the said attachment, and that the bank to which it was addressed, and, upon which it was served, was required to deliver all such property, &c., into the custody of the sheriff, &c., it stated that the sheriff particularly attached the bank account and debt from the bank to E. R. Goodridge, &c., thus clearly indicating and showing that the intent was to levy upon a particular debt and the property specified, and by necessary intendment excluding all other property, that is, limiting the general notice by the particular clause. There was no debt due from the bank, and the claim and interest of the defendant and debtor in the attachment proceedings was not described in the special clause of the notice, and it is at least doubtful whether it comes within the general clause. But the case could have been well decided upon the ground that the sheriff, by the particular form of his notice, limited his levy to the property specifically mentioned. The case did not necessarily decide the question before us.

A warrant of attachment under the Code directs the sheriff to attach and safely keep all the property of the defendant within his county, and this includes not only tangible property, real and personal, but things in action, and evidences of debt (Code, §§ 231, 462-464.

A levy upon rights and shares in the stock of associations or corporations, and debts and other property incapable of manual delivery, cannot be effected by an actual seizure, as in case of movable chattels, but they may be attached and held for the satisfaction of any judgment that may be recovered, by the proceedings authorized by section 235 of the Code. A leaving of a copy of the warrant of attachment with either of the officers or agents of the association or corporation named, or with the debtor or individual holding such property, with notice showing the property levied on, is the statutory levy impounding the property for the satisfaction of the judgment, as effectually as a seizure of chattels capable of manual delivery. The statute authorizing attachments against absconding, concealed and non-resident debtors (2 Rev. Stat. 2), accomplished the same purpose by the publication of a notice of the issuing of the warrant of attachment, and that the payment of any debts, and the delivery of any property belonging to the debtor, to him or for his use, and the transfer of any property by him, was forbidden by law, and were void, and declaring that every payment of any debt, or the delivery of any property to the debtor after the first publication of the notice, should be deemed fraudulent, as against the trustees appointed in the proceeding (2 Rev. Stat., 7, §§ 30-35). proceeding under the revised statutes was for the benefit of all the creditors of the individual proceeded against, while the provisional remedy under the Code by attachment, is for the benefit of a particular creditor, who may seize only so much of the property of the debtor as will be sufficient to satisfy the claim. Instead, therefore, of a general notice to bind and charge all the property of the debtor, a notice to the individual owning the debt, or holding the property intended to be levied upon, is authorized. The sheriff, by his action and the notice he gives, acquires no

actual dominion over the property. It is as much bevond his personal control as before the levy, and there is no particular magic in the act of giving the notice, that affects the status or the rights of any one, save as prescribed by statute, or that changes the character or actual condition or possession of the property. notice is but an act of caution to the individual upon whom it is served, intended and operating solely to prevent his paying the debt, or delivering the property to the debtor, thus impounding it to answer the judgment. It answers all the purposes which the law contemplates, if it notifies the individual that a warrant of attachment has been issued against his creditor, or the owner of property in his possession, and that the sheriff claims to levy it upon the debt owing by him, or the property in his possession; and it would be strange, indeed, if mere surplusage, the use of language so general in its terms, that it would include much more than the result would show was within the reach of the sheriff, would vitiate a notice clearly embracing debts and property subject to attachment, and owing by, or in the possession of, the individual served. A notice by the sheriff that he attaches all property, debts and effects, and all rights and shares of stock, &c., in the possession or under the control of the individual served, does show the property levied on. A particular description of the property and debts supposed to be in the possession of or owing by him, is not necessary for the information of the party served, and would not more satisfactorily show to him the property intended to be reached. The individual served, neces sarily knows better than the officer can know, the property and debts in his possession or owing by him subject to attachment.

A notice by the sheriff, that he attached all the bonds and mortgages and promissory notes belonging to the attachment debtor in the possession of an individual,

would be good, without specifying the particular securities of the debtors, and if, perchance, there should be but one bond and mortgage and no promissory notes, the excessive claim would not vitiate. case could be supposed in which a party could be mislead and injured by the generality of a notice of this kind, it might be different. To require a particular description of the rights, debts and choses in action, which would identify and distinguish them from all others of a like kind, would be to render the remedy by attachment, in a great majority of cases, abortive as a process against property of this character. Neither the pursuing creditor nor the sheriff, can ordinarily know the precise character of the dealings between the debtor proceeded against and third persons, and if no levy can be made until, by proceedings under section 236 of the Code, the particulars can be ascertained, it is quite evident that this provisional remedy would, in very many cases, be of but little practical value. It is only by a proper and sufficient levy that the property can be held, and if that cannot be made until after an examination under section 236, it is quite evident that the sheriff would in most cases, and might in all, be saved the trouble of making any levy. The party summoned for examination would have no difficulty in so disposing of the property as to put it beyond the reach of the creditor. The remedy was designed to be effectual, and to make it so, any notice which shows to the party served that any particular part, or all of the property or debts in his possession belonging to the debtor in the attachment proceedings, or owing by him, is attached, and intended to be claimed and held by the sheriff, must be held to be sufficient.

In my judgment, the plain design of the provision under consideration, and the full accomplishment of every purpose that could have been intended by a notice, is fully answered by a notice like that before us,

unless, as in Drake v. Goodridge, it is designed to levy only on a particular class or part of the property, and exclude the residue. The reasoning of Judge CLERKE upon this particular question, without reference to the facts of that case, in Greenleaf v. Mumford (19 Abb Pr., 469), is entirely satisfactory to me, and I think conclusive. The danger and difficulty of undertaking to specify and describe the particular debt or chose in action, or the particular interest intended to be attached, is exemplified in Drake v. Goodridge.

Section 236 does not qualify section 235, or aid us in determining what will be a sufficient showing of the property levied on by the notice required by the latter section. It does enable the sheriff, in his discretion, to apply for a certificate of the particular property of the debtor, in the possession of the party to whom the application is made, and in case of refusal, authorizes an examination. But the refusal by no means suspends action upon the attachment, nor prevents a levy until the examination is had. Neither is the sheriff compelled to proceed to an examination, but he may do so That proceeding is for the benefit of the if he pleases. creditor and the sheriff, but they are not bound to resort to it. If the application was made and a certificate refused, it would clearly indicate that the levy should be made at once, and an examination, if necessary, had afterwards. If the certificate is given, the sheriff is not bound by it, but may attach the property described by the certificate, and all other property liable to attachment in the possession of the party.

The judgment should be reversed, and a new trial granted.

All the judges concurred.

Judgment reversed, and a new trial granted, costs to abide the event.

Timpson's Estate.

TIMPSON'S ESTATE.

Before the Surrogate of Westchester County; April, 1872.

Again, January, 1874.

DEVISE.—POWER.—DOWER.—SURROGATES' COURTS.— CONTEMPT.

The devisee of land, subject to a power given to the executors to sell and convey, has a vested estate, of which, on his death after the testator's death, and before the exercise of the power of sale, his widow is entitled to dower; and on a subsequent exercise of the power of sale, the widow is entitled to share in the distribution of the proceeds when brought into the surrogate's court under Laws of 1837, ch. 460, § 75 (3 Rev. Stat., 5 ed., 198, § 72).

Surrogates' courts have power to issue attachment to punish executors and administrators for a breach of their trust.

The case of the matter of Watson, 3 Lans., 408,* explained and qualified.

Under 2 Rev. Stat., 538, § 23,—declaring that when the misconduct complained of consists in the omission to perform some act or duty which it is yet in the power of the defendant to perform, he shall be imprisoned only until he shall have performed, &c.,—inability to perform the duty, if resulting from the act or omission of the defendant himself, is not a defense.†

I. April, 1872.

The testator, Thomas Timpson, died in 1856, leaving a will, by which, after giving various legacies, he devised and bequeathed all the rest and residue of his real and personal estate to his children, their heirs and assigns, share and share alike.

By the next clause of his will he authorized his ex-

^{*} Affirmed in 5 Lans., 466.

[†] See People ex rel. Crouse v. Cowles, 3 Abb. Ct. App. Dec., 507.

Timpson's Estate.

ecutors and the survivor of them to sell and convey his real estate, so devised.

The surviving executor acted under this power and sold and conveyed the real estate in 1871, fifteen years after the death of the testator.

Intermediate the death of the testator and the sale, some of the devisees have died leaving widows and heirs at law, and some of the heirs at law of deceased devisees have died leaving widows.

D. R. Jacques, for the executor.

J. W. Mills, for Mrs. Timpson.

BY THE SURROGATE.—The question presented for consideration is, what, if any, interest have these widows in the proceeds of the sale.

Section 72 (3 Rev. Stat. [5 ed.], 198), provides that "the proceeds of a sale of real estate made in pursuance of an authority given by any last will may be brought into the office of the surrogate before whom such will was proved, for distribution; and the surrogate shall proceed to distribute the same in like manner and upon like notice as if such proceeds had been paid into his office in pursuance of an order of sale of real estate for the payment of debts."

Where land is sold by order of the surrogate to pay debts, the statute directs that after paying the expenses of sale, &c., he shall next satisfy any claim of dower which the widow of the testator or intestate may have upon the land so sold, &c. (3 Rev. Stat. [5 ed.], 104, § 45).

Section 52 provides that "if after the payment of debts and expenses there be any overplus of the proceeds of the sale, the same shall be distributed among the heirs and devisees of the testator or intestate, or the persons claiming under them, in proportion to their respective rights in the premises sold."

Timpson's Estate.

Now, it is quite certain that the title to the lands sold vested, immediately at the testator's death, in the devisees, by virtue of the will, and so remained until the power to sell, conferred upon the executors, was exercised. There was a seizin in deed, or in law, of the devisees. If therefore a husband, who was a devisee or belonged to the class of devisees, died during his seizin and before sale, it seems to me the wife was entitled to dower (4 Kent Com., 41). A seizin in law is as effectual as an actual seizin (2 Bl. Com., 131; Clancy's Rights of Women, 198).

The devisees had an estate of inheritance in the lands—a base fee—not a fee simple (2 Bl. Com., 109). A base, or qualified fee is such an one as hath a qualification subjoined thereto, and which must be determined whenever the qualification to it is at an end. It is a limited fee—and the estate is a fee, because by possibility it may endure forever in a man and his heirs (1 Shars. Bl. Com., 109). And the widow is entitled to be endowed of all lands and tenements of which her husband was seized in fee simple or fee tail, at any time during the coverture, and of which any issue, which she might have had, might by possibility have been heir (1d., 131; Litt., § 53; Washburne on Real Prop., 154).

It is plain in this case that there was a possibility of the surviving executor dying without having exercised the power of sale, and then there would have been an estate in fee simple absolute, in the devisees, their heirs and assigns forever.

Thus it is abundantly established that the widows in question were endowed of these lands to the extent of the seizin of their respective husbands.

The title thus vesting in the devisees, when one of these devisees died leaving a widow and children, and the land having been sold under the authority contained in the will, it seems to me the proceeds of the sale are to

be regarded as land and that the widows should take their respective one-third for life. Although Chancellor KENT says that "In equity, lands agreed to be turned into money, or money into lands, are considered as that species of property into which they were agreed to be converted, and the right to dower is regulated in equity, by the nature of the property in the equity view of it" (4 Kent Com. 50), yet in law as well as in equity the proceeds of the sale of the lands in this case, are, I apprehend, to be treated as if they were lands. The statute, it will be seen, directs their distribution in the same manner as if they were proceeds arising from a sale of the lands ordered sold by a surrogate to pay debts. It is true the chancellor says at page 57, "If an estate be conveyed to such uses as the purchaser by deed or will should appoint, and in default of appointment, to the purchaser in fee, it is settled that the estate vests in the purchaser as a qualified fee, subject to be divested by an exercise of the power (for the power is not merged in the fee), and, consequently, dower attaches. It has been a questionable point, whether a subsequent exercise of the power, as being a prior or paramount right, would not dislocate and carry with it the dower of the purchaser's wife. The better opinion is that the dower is defeated by the execution of the power." Here the dower is not defeated by such a paramount title and right of seizin as is referred to by Washburne at page 239. At 208 of his able work on Real Property, he says, however, "If lands which have descended to an heir are sold for payment of the ancestor's debts, or by an executor under a power in the will of the testator, the seizin of the heir or devisees, although completed by entry, will thereby be divested, and the right of dower in his wife defeated." To sustain this position he cites as authorities, cases in the courts of the States of Ohio, Pensylvania, and North Carolina, which I have not

been able to consult. It may, however, be sufficient to say, that in either case the heir and the widow are both undoubtedly divested of their estate or interest in the lands, and a good title obtained by the purchaser, and it is equally certain, that when the object of the sale has been accomplished, the heir or devisee has an interest in the surplus proceeds.

The statute of our own State, as has been shown, does divest the title of the heir or devisee, as well as that of the widow, in the land sold under an order of sale to pay debts, but at the same time, secures the interest of the widow and the heir or devisee, in the proceeds of the sale, and vests a good title in the purchaser. The widow is to receive a sum in gross, if she so elect, in lieu of her dower interest in the land sold. or will have one-third part of the purchase money put at interest for her benefit as dower. A widow is in the care of the law and a favorite of the law. It may be laid down as an almost universal proposition, that where estates, out of which widows were entitled to dower, have been sold by order of court, or have been so sold as to give courts of equity jurisdiction over the money, these courts will allow the widows dower out of the money (1 Washburne on Real Prop., 243). And this court has equity powers within the scope of its statutory jurisdiction. Appeals from its decisions were formerly made directly to the court of chancery, and since the peculiar powers of that court have been transferred to the supreme court, such appeals are taken to the equity side of the latter court. As has been shown. these widows were entitled to dower in the lands sold, and this court has jurisdiction over the proceeds of the sale.

I reach the conclusion, therefore, that the widows of devisees who have died seized of an estate of inheritance in the lands in question should be allowed their dower out of the moneys to be distributed.

II. January, 1874.

On May 3, 1872, a decree was made in the above matter directing the sole surviving executor among other things to pay to John C. Timpson a devisee of aeceased some four thousand and forty dollars and nin ty-eight cents, the executor then having the money on hand. About July 12, 1873, an application was made on behalf of the devisee, alleging a demand of and refusal to pay his distributive share of the proceeds of sale of real estate, for a citation directing the executor to appear and show cause why he did not pay it, or show cause why an attachment should not be issued against him. The citation was issued returnable August 18, 1873. He ultimately appeared and alleged as cause that he had no funds wherewith to pay. That when he had the money he sought to find the devisee but could not do so, and subsequently was so unfortunate as to mingle the funds with his own or convert them to his own use, and lost the whole.

The court afterwards issued an attachment against the executor directing that he should be brought before the court to answer as for a contempt in not having complied with the direction contained in the decree. The attachment was served and the parties appeared in court, interrogatories and answers thereto were duly filed, from which it appeared that the ejecutor had converted the fund and it was lost, and counsel discussed and submitted the question as to whether the facts and law gave the surrogate jurisdiction to issue a precept for the imprisonment of the executor.

S. M. Ostrander, for legatee.

D. R. Jacques, for executor.

BY THE SURROGATE.—Subdivision 4, section 1, 3 Rev. Stat. [5 ed.] 362, provides that every surrogate shall

have power to enforce the payment of debts and legacies, which power shall be exercised in the cases and in the manner prescribed by the statutes of this State.

Section 10, p. 364, gives the surrogate power "To enforce all lawful orders, process and decrees of his court by attachment against those who shall neglect or refuse to comply with such orders and decrees, or to execute such process, which attachment shall be in form similar to that used by the court of chancery in analogous cases."

Section 21, p. 366 (Laws of 1837), makes attachments, &c., returnable to the county where they are issued, and also makes applicable to attachments issued by surrogates, 3 Rev. Stat., 5 ed., §§ 10, 11, 12, 13 and 16-32, inclusive, pp. 851-853.

It seems to be pretty well established by authority. that surrogates' courts are not courts of record, notwithstanding the case In the Matter of Latson, 1 Duer, The authorities holding a contrary doctrine are Seaman v. Duryea (10 Barb., 523; Dayton on Sur., p. 6); Doran v. Dempsey (1 Bradf., 490); In the Matter of Watson (3 Lans., 408). Concurring fully with these authorities upon this point, it is very plain that none of the provisions on pages 840-855, inclusive (3 Rev. Stat.), are at all applicable to surrogates' courts, except the sections above quoted. Were it otherwise, where was the necessity of the act of 1837, making those sections applicable to these courts. Subdivision 3 of section 1, p. 849, providing that attachments may issue against persons for the non-payment of any sum of money ordered by "such court" in cases where, by law, execution cannot be awarded for the collection of such sum, refers to and affects courts of record only, and has no application here.

Although, by the act of 1837, provision is made for the docketing of surrogate's decrees with the clerks of the supreme court, and for the issuing of execution

thereon, surrogates have still the power to enforce obedience to their decrees by attachment. This power was conferred upon them by the Revised Statutes, which went into effect in 1830, and at that time the ordinary mode of enforcing payment of any judgment or decree was by imprisonment, and the act abolishing imprisonment for debt went into effect the following year. This act takes away the remedy by imprisonment on civil process in suits and proceedings for the recovery of money due upon judgments or decrees founded upon contract, or due upon any contract, express or implied. Unless the judgment or decree is founded upon contract, or the money is due upon contract, express or implied, the act affords no protection, and the power to imprison remains the same as before it was passed. Here there is a trust, and it is one of obligation and duty, and not of speculation and profit. The executor cannot mingle the trust money or property with his own, or convert it to his own use, however honest and sincere may be his purpose to restore it when wanted (Seaman v. Duryea, supra, and cases cited). In the principal case, the upright and able judge further says: "He is to hold the one and invest the other for the profit of his ward, and to have the property and money or the securities which represent the money, at all times subject to such order as the court, from which he derives his office, may see proper to make. If the order is to deliver over the property, transfer the securities or pay the money to the ward when of age, or to the new guardian when he is not; the law assumes his ability to do what the obligations of his duty require that he should do, and he cannot evade his responsibilities and change his position as a trustee into that of a mere contract debtor, by the allegation, real or pretended, that the trust property has been converted to his own use. Section 2 of the non-imprisonment act declares that the provisions shall not extend to con-

tempts to enforce civil remedies, and the act of May 9, 1846 (Laws of 1846, p. 164), provides that in actions upon contracts for moneys received by male persons in a fiduciary capacity, the defendants 'shall be liable to imprisonment in the same manner as in actions for wrongs.' These several enactments indicate no disposition to relax the law of imprisonment in regard to trustees made liable for trust property." This case was afterward reviewed in the court of appeals (11 N. Y. [1 Kern.], 324), and the decision of Judge Brown, at special term, holding that the attachment had been properly issued and the defaulting guardian properly imprisoned, was affirmed with but one dissenting voice.

The case of Hosack v. Rogers (11 Paige, 603), is relied upon by the executor's counsel, to show that an attachment cannot be issued, and the same case is referred to in the Matter of Watson as sustaining the doctrine of that case, but I apprehend it is not in point. The suit was to recover a debt on contract, and a decree fixing the amount of such indebtedness was made, and the chancellor very properly decided that he could not enforce it by attachment.

In the case of Doran v. Dempsey (1 Bradf., 490), also relied upon in the Matter of Watson, the learned surrogate does not attempt to decide that in such a case surrogates have no power to issue attachments; but simply determines that he will not do it in that case. In Saltus v. Saltus (2 Lans., 9), the case of Doran v. Dempsey is merely referred to, but neither approved nor disapproved, but the power of the surrogate to issue an attachment is distinctly recognized.

It is true the process of attachment to be issued must be "in form similar to that used by the court of chancery in analogous cases" (Rev. Stat., § 10, subd. 4, 364), but the "analogous cases" are those existing at the time of the adoption of the Revised Statutes in

1830. That the statute contemplated the process theretofore used and not thereafter to be used by the court of chancery in such cases, I think, admits of no serious doubt. By the Laws of 1813, p. 195, it will be seen that the court of chancery might enforce the performance of any decree, or obedience thereto, by execution against the body of the party against whom the decree shall have been made, which would be in the nature of a ca. sa. (Blake's Chan. Appen., p. 26). But the statute did not take away the right of the court to enforce its decrees by attachment (Hosack v. Rodgers, supra)... An attachment against the body of the executors here will not only be in form, but also in substance, similar to that used by the court of chancery in such a case. And then on being brought before the court, interrogatories and answers thereto are to be filed, and if no sufficient cause to the contrary be shown, a writ or process of commitment will be issued against him. The office of an attachment is to bring the party into court to answer for some alleged dereliction of duty. differs from arrest in that he who arresteth a man carrieth him to a higher power to be forthwith disposed of; but he that attacheth keepeth the party attached, and presents him in court at the day assigned, as appears by the words of the writ" (Jacob Law Dic., tit. Attach.). Iti.'n' the court in the Matter of Watson, lost sight of the distinction have een an attachment and a process of commitment in the attachment proceeding -the statute regulating the form of the attachment only and not of the process of commitment. The surrogate, after having issued the attachment of a form similar to that used by the court of chancery, proceeds to punish by a process adapted to the case.

The remaining point to be considered is, what is the effect of 3 Rev. Stat., § 23, 853, which declares "that when the misconduct complained of consists in the omission to perform some act or duty, which it is yet

in the power of the defendant to perform, he shall be imprisoned only until he shall have performed such act or duty and paid such fine," &c. It is claimed on the part of the executor, that he has converted the trust funds to his own use, since the decree was made, and has now lost the whole, and that, therefore, having no pecuniary power to perform the duty of paying imposed by the decree, he has placed himself in a position which entitles him to escape punishment for his misconduct, and to be treated as a simple debtor of the injured party. Can this be? Is such the object and intent of that section? It seems to me that such a construction would do violence to all our ideas of justice, and is emphatically disapproved by Justice Brown in the case of Seaman v. Duryea. If it were the law, then any executor, administrator, or guardian, by taking the fund held in his fiduciary capacity and using it to pay his own debts, may escape punishment by coming into court and showing that he has not the pecuniary power to perform the act of paying, enjoined by the decree. It is an old and sound maxim that no one shall be permitted to take advantage of his own wrong. It strikes me, that the section under consideration applies only to those cases where it is physically impossible to perform the act or duty, as where the decree directs the delivery of specific things, which have perished or been destroyed, and the like, and not to the mere direction for the payment of money. I am strengthened in this view, by the amendment of section 20 of the statute in 1843, which adds thereto these words: "But in all cases which have arisen or may hereafter arise under the provisions of this title, the court or tribunal ordering such imprisonment may, in their discretion (in cases of inability to perform the requirements imposed), relieve the person or persons so imprisoned, in such manner and upon such terms as they shall deem just and proper." In section 23 the words

are "power, &c., to perform," and in the above amendment "inability to perform."

Before the adoption of this amendment, it seems to have been held that the only mode by which a party could be relieved from imprisonment for contempt in not paying a sum of money ordered by the court to be paid, was by an appeal to the pardoning power (People v. Bennett, 4 Paige, 282, or by application to the legislature; Van Wezel v. Van Wezel, 3 Paige, 38; 2 Barb. Ch., 281).

The executor had all the money, amounting to thirtyfive thousand eight hundred and forty-four dollars and seventy-nine cents, in his hands at the time the decree in this matter was entered. He retained as belonging to him, and paid out thirty-one thousand eight hundred and three dollars and eighty-one cents to various devisees, leaving in his hands four thousand and forty dollars and ninety-eight cents, as the share of John C. Timpson, the petitioner, whom he represents that he could not find. This fund he converted to his own use. and the whole is lost. In this he was clearly guilty of misconduct which "was calculated to, or actually did defeat, impair, impede or prejudice the rights or remedies" of said John C. Timpson, in a matter depending in this court, and is thus clearly brought within the provisions of section 20, which authorizes the court to impose a fine or to imprison him, or both, and afterwards the court may relieve him from imprisonment on becoming satisfied of his inability to pay. The statute as thus amended furnishes a perfect scheme for the adequate punishment of such delinquents, and for their relief and ultimate discharge in proper cases. It would be strange, indeed, if legislative wisdom had failed to furnish appropriate methods to punish those guilty of breaches of trust-an offense in these days of so frequent occurrence and so alarming in amounts involved.

It is with much diffidence that I find myself obliged to disregard certain *dicta* of the learned justice who delivered the opinion of the court in the Matter of Watson, but the case of Seaman v. Duryea, and a careful examination of the statutes and authorities, leaves me no alternative.

A precept must, therefore, be issued, directing the sheriff of Westchester county to take into his custody the person of the executor, and so keep him until the further order of the court.

THE PEOPLE on the relation of THE MAHOPAC MANUFACTURING COMPANY against VAN NORT.

Supreme Court; Special Term, January, 1874.

MANDAMUS. — CONTRACT BY PUBLIC OFFICER. —
VESTED RIGHT.

The relators agreed with the commissioner of public works of the city of New York, that the latter might enter on their property, and connect a lake thereon, with the aqueduct of the city, on condition that the commissioner should apply to the legislature for the passage of an act authorizing the purchase of the lake, &c., or the taking of the same by process of law for just compensation; and pursuant to this agreement, the commissioner entered and used the waters, and the legislature passed an act for the purpose contemplated, and the city, for a considerable period, enjoyed the use of the water; but the commissioner and his successor failed to agree with the relator on a price, or to take proceedings to acquire the property; and the city finally ceased to make use of the waters. Held, 1. That these facts did not constitute the relation of vendor and purchaser between the relator and the city.

2. Such a contract by the commissioner, if one had been made, would not bind the successor of the commissioner nor the city, without a ratification.

3. The agreement, and the statute passed consequently, and the mere commencement of proceedings to take the relator's property, would not, at least until a report of commissioners thereon, confer any vested right on the relator.*

The Lake Mahopac Manufacturing Company applied to the supreme court, on affidavits, for the issue of a mandamus to compel George L. Van Nort, the commissioner of public works of the city of New York, to make application to the supreme court for the appointment of commissioners, to ascertain and appraise the compensation to be paid, by the city, to the relators, for property taken by the city under an arrangement originally made with William M. Tweed, the predecessor of the defendant, and the act of February 27, 1871 (1 Laws of 1871, p. 88, ch. 56).

The allegations relied on by the relator were to the following effect:

Tweed, acting in behalf of the city, but at first without authority, entered into negotiations with the relators to obtain the use of the waters of Lakes Kirk and Mahopac, for and in behalf of the city.

Those negotiations resulted in an agreement, that he might take possession of the property in behalf of the city, with the understanding that he should apply to legislature for authority to acquire title to it for the city, either by purchase or by due process of law.

He took possession pursuant to that agreement and understanding, and the legislature subsequently conferred upon the commissioner of public works the requisite authority to acquire title to the property (Laws of 1871, pp. 88, 639; Laws of 1873, ch. 344).

Being unable to agree with the owners of the property as to the price to be paid therefor, Tweed, before he went out of office, in the latter part of 1871, not only to agreed make an application for the appoint-

^{*} Compare Matter of Washington Park, p. 148 of this volume.

ment of commissioners, but caused the papers to be

prepared for such application.

From the time Tweed so took possession in behalf of the city down to the time the respondent came into office, the city retained possession of and used the property and exercised acts of ownership over it, by constructing the necessary works thereon for drawing the waters from the lakes, and conducting the same to the Croton mains leading to the city.

Henry W. Johnson, for the relator;—Insisted that the plaintiff showed that the defendant had ratified Mr. Tweed's election to take the property, and that Philips v. Thompson (1 Johns. Ch., 131), recognized the relator's right to have a decree for specific performance, since they had shown complete performance on their own part.

William R. Martin, for the defendant.—I. Insisted that the only form in which a mandamus could issue would be to compel the commissioner to exercise his discretion in reference to whether the property should be taken (People v. Supervisors, 24 How. Pr., 119; People v. Croton Board, 49 Barb., 259; People v. Green, 64 Id., 162, 493; People v. Supervisors, 51 N. Y. 401).

II. A mandamus, if issued, would be fruitless, because under the statute (3 Edm. Stat., 621, § 14), his application for the appointment of commissioners to take the land must be founded on his affidavit of its necessity, which he could not make (People v. Tremaine, 29 Barb., 99; People v. Commissioners, 27 Id., 94; People v. Canal Board, 4 Lans., 274).

III. The extent of land needed had not been defined, nor had the land been appropriated. In the cases where mandamus is granted to public officers or parties directing them to take proceedings to acquire

title to lands for public use, there has been a distinct appropriation of the land by the statute, or there has been an explicit act by the officer or party declaring and defining the land needed, which by the statute or by the law has been made final and conclusive in respect to its condemnation (See Brooklyn Park Commissioners v. Armstrong, 3 Lans., 429; People v. Common Council of Brooklyn, 22 Barb., 412; Morgan v. Metropolitan R. Co., Law R., 1 C. P., 103; Fotherly v. Metropolitan R. Co., 2 Id., 188; Reg. v. Woods & Forest Com., 12 Jur., 915).

IV. The relator asks more than he is entitled to, for defendant may decide that a part of the land is unnecessary (People v. Green, 64 Barb., 174; People v. Commissioners, 22 How. Pr., 291).

V. The use already made did not give vested rights (People v. Brooklyn, 1 Wend., 318; Wolfe v. Frost, 4 Sandf. Ch., 95; Story Eq. Jur., § 760; Lowry v. Tew, 3 Barb. Ch., 407)

VI. A clear and precise right has not been shown; and the mandamus should therefore be denied (People v. Supervisors, 11 N. Y. [1 Kern.], 563; People v. Morton, 62 Barb., 572; People v. Canal Board, 13 Id., 444; People v. Green, 63 Id., 390).

VII. The city should be allowed to recede, and discontinue proceedings (Buck v. Parish of Marylebone, 15 Q. B., 761; 20 L. T. N. S. Q. B., 697; People v. Croton Board, 49 Barb., 259; People v. Brooklyn, 1 Wend., 321; Phillips v. Thompson, 1 Johns. Ch., 131).

GILBERT, J.—I am very clear that this motion should be denied:

First. Strictly speaking, the engagement of Mr. Tweed was that the requisite legislative authority to acquire the relator's property, either by purchase or compulsorily by the right of eminent domain, should

be procured. This was accomplished by the act of February 27, 1871.

Second. The transaction between Mr. Tweed and the relator did not create the relation of vendor and purchaser between the relator and the city. Mr. Tweed was not empowered to enter into such a contract on behalf of the city, nor was he the agent of the city for such a purpose by virtue of his office of superintendent of public works. The contract itself, as stated by the relator, was merely that authority to acquire the property should be obtained. What should be done after the authority should have been obtained was not stated in it. Neither party engaged to do anything; the relator did not become bound to sell or the city to buy.

Third. Such a contract by a public officer would be against public policy and void at the election of the principal for whom he ostensibly acted without some act of ratification by the latter. A public officer cannot thus bargain away beforehand the discretion reposed in him by law (Bliss v. Matteson, 52 Barb., 345; S. C., 45 N. Y., 22). Much less can he bind his successor in that way. There has been no ratification by the city authorities, for the reason that it does not appear that they ever knew of the existence of the contract or of the claim of the relator in respect to it. Mr. Van Nort had no more power to ratify than Mr. Tweed had to make the contract.

Fourth. Nothing has been done under the act of 1871 which gave the relator any vested rights. The act authorizes the commissioners of public works to make a voluntary purchase, or, if that cannot be effected, to take the required proceedings to acquire title to the property compulsorily. It does not take or appropriate the property of the relator, or even specify the property which it authorizes to be acquired, but is general in its terms, and authorizes the acquisition of

any property. Nothing of any legal importance has occurred with respect to the matter since Mr. Tweed went out of office. While he was in office negotiations for a purchase were had between him and the relator, which produced no result, and he directed the preparation of the necessary papers preliminary to an application to the court for appointment of commissioners of appraisement pursuant to the act of 1871, which the relator avers were, in fact, prepared. But no application had ever been made, and the defendant has determined that none ought to be made. He is vested with exclusive discretion on the subject, and the court has no power to coerce the exercise of that discretion-Even if such an application had been made and even now pending, those facts alone would not vest any right in the relator; for the act of 1871 adopts the provisions of the general railroad act on this subject, and by the latter act the proceedings remain inchoate until confirmed by the court, or, at all events, until the report of the commissioners shall have been made. Before the proceedings are complete neither party acquires any vested right (People v. Brooklyn, 1 Wend., 318; Hill v. Commissioners of Worcester, 4 Gray, 414).

No hardship accrues to the relator from the application of these principles. He dealt with a public officer and is charged with knowledge that such a person can act only in a trust capacity for the public good and in conformity with the law creating the trust. If he has sought by means of antecedent engagements to control the performance of the trust created by the act of 1871, for his own benefit, he cannot complain that the law will not sanction the accomplishment of such an object.

The motion must be denied, but without costs.

GOODENOUGH against SPENCER.

Supreme Court, First District, First Department; General Term, January, 1874.

FRAUDULENT CONVEYANCES.—ATTORNEY AND CLIENT.

A conveyance intended by both parties to hinder and delay the creditors of the grantor cannot even as against the grantor, be sustained in favor of the grantee or his assignee with notice, by reason of the fact that the grantee was the attorney and counsel of the grantor, and as such advised and received the conveyance.

Attorney and client, when parties to such a transaction are not regarded as in pari lelicto; but the client will be relieved if it can be

done without injury to an innocent purchaser.

A purchaser who consented to leave the property in the grantor's possession, stipulating that it should remain there for the period of sixty days, held to be put on notice; and, therefore, having purchased without inquiry, he took subject to equities.

Milton A. Goodenough brought this action against Wm. H. Spencer, to recover possession of certain personal property which Spencer had transferred by bill of sale to Stevens, his counsel, and which Stevens had sold to the plaintiff.

The evidence in this action showed and the referee found, that on March 1, 1870, the defendant executed and delivered unto Samuel Stevens, his attorney and counsel in legal proceedings, a bill of sale of household furniture, horses, cattle, sheep, wagons, harness, grain and hay, then being in, upon and about his dwelling house and farm, situated in the town of York, Livingston county, and State of New York. The consideration recited in the bill of sale was five thousand dollars, thereby paid by the defendant to him for certain counsel fees, and moneys for legal services, due, or to

become due in certain matters at the date of the bill of sale in the hands of the vendee, including suits at law, and other matters of adjustment, counsel and advice, disbursements and moneys laid out and expended, costs and charges, and other good and valuable considerations. The property included in the bill of sale, was of the value of five thousand dollars. And at the time of its execution and delivery, the defendant owed the vendee not exceeding the sum of four hundred dollars, but that sum was found to form no portion of the actual consideration for which the bill of sale was given.

The defendant was then in embarrassed circumstances, and was about to be examined in supplementary proceedings taken on a judgment recovered against him. And at the suggestion of the vendee, his attorney and counsel, he executed and delivered the bill of sale to him, in order to prevent the property referred to in it, from being appropriated by his creditors to the payment of his debts, upon the agreement on the part of the vendee, that he would transfer it again to the defendant after his financial difficulties had been overcome.

After the execution and delivery of the bill of sale, the defendant remained in the undisturbed possession of the property mentioned in it, as it was understood between the parties to it that he should at the time when it was delivered, and used and enjoyed it as his own.

On or about August 12, 1870, Samuel Stevens, the vendee in the bill of sale, procured from the plaintiff the sum of twenty-five hundred dollars, and delivered him a written assignment of the bill of sale accompanying the bill of sale itself. This assignment was absolute in its form, but the plaintiff under date of August 13, 1870, entered into an agreement with Stevens, by which he agreed to assign the bill of sale back to him

for the sum of three thousand dollars to be paid on or before November 1, 1870.

During the defendant's examination in the supplementary proceedings, he testified that he conveyed his personal property to his counsel, Samuel Stevens, for services.

Before the plaintiff took the assignment of the bill of sale, he was informed that the defendant had given that testimony. But it appeared on the trial, according to the conclusion of the referee, that the statement was made under the suggestion and advice of the defendant's attorney and counsel, the vendee in the bill of sale.

Before the assignment of the bill of sale the plaintiff was advised by his own counsel that he could safely purchase the same, and by doing so would acquire title to the property described in it. The plaintiff took the assignment of the bill of sale upon that advice, and upon the evidence given concerning it on the supplementary examination, and the statement contained in the bill of sale itself, believing that by doing so he would acquire a good title to the property described and mentioned in it.

At the time of the assignment it was orally agreed between the plaintiff and Stevens, that the plaintiff should not interfere with the property in the bill of sale for the period of sixty days. And the plaintiff was also informed by Stevens that he was defendant's attorney and counsel, that he had been employed by him in various suits and other matters, for which the defendant owed him a large sum of money, and that the bill of sale was given for such services, and was regular and proper. He also informed the plaintiff that the property was in the possession of the defendant at his farm or place in Livingston county, and had continued in his possession since the execution of the bill of sale. All this information was communicated

to the plaintiff before he took the assignment of the bill of sale. Proof was also given from which it was found that the plaintiff had no knowledge or notice of the real state of the transaction as it existed between the defendant and his attorney and counsel.

The defendant refused to deliver the property to the plaintiff. And this action was brought for the recovery

of its possession.

The referee reported in favor of the defendant; and from the judgment entered on the report the plaintiff appealed.

D. McMahon, for plaintiff, appellant.

Theron George Strong, for defendant, appellant, besides the cases cited in the opinion, cited Comstock v. Comstock, 57 Barb., 453; Brock v. Barnes, 40 Id., 521; Mason v. Ring, 3 Abb. Ct. App. Dec., 210.

BY THE COURT. *- DANIELS, J.-Although the character of the transaction which resulted in the execution and delivery of the bill of sale from the defendant to his attorney and counsel was in dispute upon the trial, the evidence was sufficient to justify the referee in the conclusion he adopted concerning it. And for that reason that conclusion must now be accepted as exhibiting the transaction in its true light. It was in brief a transfer made by an embarrassed client to his attorney and counsel under the advice and suggestion of the latter, without any actual consideration, but for the purpose of having the property held by him, for the sole use and enjoyment of the defendant, so long as it was in danger of being seized by his creditors for the payment of their debts, and after that danger had been successfully avoided, restoring the formal title again to the defendant. And that intention appears to

^{*} Present Davis, P. J., and Daniels and Donohue, JJ.

have been observed until the vendee undertook to transfer the property to the plaintiff for the consideration he received for doing so, on the assurance that the bill of sale was regular and proper.

By the statutes of the State a transfer of property made by a debtor for the purpose of withholding it from the satisfaction of the lawful demands of his creditors is prohibited. And the person who receives, as well as the one who transfers the title, for the promotion of such a design, are both rendered so far criminal as to be guilty of a misdemeanor (2 Rev. Stat., 690, § 3).

In the consummation of this transaction both parties to it involved themselves in the guilt of this offense. And the vendee cannot shield himself from its consequences by reason of the circumstance that its commission arose out of the advice sought for his protection by an embarrassed and insolvent client. attorney or counsel has the right, in the discharge of professional duties, to involve his client by his advice in a violation of the laws of the State. And if he does so, he becomes implicated in the client's guilt, when by following the advice, a crime against the laws of the State is committed. The fact that he acts in the capacity and under the privileges of counsel, does not exonerate him from the well founded legal principle which renders all persons who advise or direct the commission of crime, guilty of the crime committed by compliance with the advice or in conformity with the direction which may be given.

But while both the attorney and his client may be rendered criminally guilty in such a transaction, the law does not allow the attorney to profit by it, when it results in an apparent advantage to him from compliance with the advice given by him. lation existing between attorney and counsel and client is one of trust and confidence, placing the interests and rights of the client very much under the guardianship

and control of the counsel, and liable to abuses resulting in serious and lasting injury to the client.

The law regards the client as very much under the influence and control of the attorney and counsel, while the ordinary professional relation exists between them, and for that reason the conduct and acts of the latter are closely watched and scrutinized.

If he bargains with the client, while the relation exists to his own advantage and the detriment or prejudice of the client, the law attributes the result to the use made of his undue influence over the conduct of the client, and in the absence of satisfactory evidence of good faith on the one part, and entirely voluntary action on the other, sets aside and annuls the transaction. So decided are courts of justice in the observance and enforcement of this principle, that the attornev and counsel will not be permitted to retain the fruits of even an unlawful contract, where under ordinary circumstances no relief would, on account of the illegality of the enterprise, be awarded to either party. Where one party through the means of an unlawful agreement acquires the property of another, the law regards them as equally in fault, and will do nothing for the redress or protection of either side. But when that advantage is secured by an attorney or counsel from his client, the parties are not considered as being equally in the wrong. The law then regards the client as being drawn into the violation of its provisions, through the controling influence of his attornev and counsel over him, and for that reason intervenes for his protection. Hence in a transfer like that made by the defendant to his attorney and counsel by the bill of sale, which was executed and delivered in this instance, although both parties to it violated the law, the defendant was not equally in the wrong, and the transfer will be annulled, for the purpose of relieving him, if that can be done without injury to an

innocent purchaser (Ford v. Harrington, 16 N. Y., 285; Freelove v. Cole, 41 Barb., 318; Evans v. Ellis, 5 Denio, 640; Howell v. Ransom, 11 Paige, 538).

But that relief will not be carried so far as to disturb the rights of an innocent third party who in good faith may have been induced to part with his money or his property, relying upon the title the attorney and counsel had the apparent right and power of transferring; the rule in that case being that where one of two innocent persons must suffer by the fraud or misconduct of a third, the loss shall be borne by him who conferred upon the wrongdoer the means of deceiving persons honestly dealing with him (Rawls v. Deshler, 4 Abb. Ct. App. Dec., 12; S. C., 3 Keyes, 572; affirming 28 How. Pr., 66; Whitlock v. Kane, 1 Paige, 202, 208).

Under this principle, even though the transfer of the defendant's property to his attorney and counsel would be at once set aside, as between them, the rules could not be so far extended as to annul the plaintiff's title, if he had been entirely justified in his conclusion that the defendant had parted with all his rights and interest in the property sold. But he was not, for he omitted one important indication of the continued existence of those rights, arising out of the circumstance that the property still remained in the defendant's possession. And in addition to that he was required to stipulate to allow continuance in that condition for the period of sixty days after the assignment of the bill of sale to him. These circumstances were not consistent with the existence of an indefeasible title in the person the plaintiff dealt with. They unmistakably pointed to the fact, that the defendant had or claimed to have some interest in or right to control the property his vendee proposed to sell, notwithstanding the recitals in the bill of sale, the assurances the plaintiff received, and the evidence the defendant had pre-

viously given. And the plaintiff should have applied to the defendant for the information which these circumstances admonished him might be given, if he had designed to follow the dictates of reasonable prudence, and in that manner to guard himself against loss arising out of the purchase of another person's property. The fact that he failed to make the inquiry the defendant's possession suggested the propriety of, is sufficient to render him responsible for all the information which such an inquiry would have secured. And that affects the title he acquired with all the infirmities it had in the hands of the man from whom he obtained it (Williamson v. Brown, 15 N. Y., 354; Grimstone v. Carter, 3 Paige, 421; Reed v. Gannon, 50 N. Y., 345; Baker v. Bliss, 39 Id., 70).

Under this defect in the plaintiff's title he stood precisely where his assignee did before the assignment, holding it in subordination to the defendant's right to annul the sale as the result of the undue influence his attorney and counsel exercised over him in procuring it.

The learned counsel for the plaintiff is entirely right in his position that the admissions and declarations of Stevens in contravention of his title were not admissible as evidence on the trial of this action. And if any of the oral or written statements made by him and received during the trial had the least bearing on the conclusion arrived at by the referee, the judgment would necessarily be reversed.

But they did not, for they were mostly on immaterial inquiries having no influence by the way of proof on any of the material facts in the case. The most important of all was the direction or suggestion to the defendant himself that he should return to Geneseo, and instruct his counsel the e to have the assignment set aside at once as it was of no value whatever, as he had never taken possession of it. The only fact this statement had any tendency to prove was the circumstance

that Stevens or the plaintiff never took possession of the property sold. And that was in no way disputed in the case.

It was not pretended by any one that either Stevens or the plaintiff ever had possession of the property.

On the contrary, the fact was beyond dispute the

the other way.

There was no impropriety in excluding what was said about not putting the bill of sale upon record, because it was in no sense a security while it stood in the hands of Stevens. If it was valid in his hands at all, it was an absolute title. As it cannot be maintained in that form, there could be no materiality in any reason suggested for not putting it upon record.

The referee has negatived the idea that it might have been designed as a security, for that reason it was not such an instrument as the law required or allowed

to be placed upon record.

The case presents no ground on which the judgment can be properly disturbed.

It should therefore be affirmed, with costs.

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STERNBERGER against McGOVERN.

Court of Appeals; February, 1874.

Reversing 4 Daly, 456.

SPECIFIC PERFORMANCE. — PECUNIARY AWARD IN
LIEU OF DOWER.—PLEADING.—JOINDER OF
LEGAL AND EQUITABLE CAUSES OF
ACTION.—DISMISSAL OF
COMPLAINT.

It seems, that a contract by which A. agrees to sell and convey his land to B. for a specified sum, to be paid in part by B.'s conveying other land to A., and B. agrees to sell and convey such other land to A., for a specified price to be paid by A.'s said conveyance to B., is an agreement for an exchange, not for sales; and if one party proves unable to convey title, he cannot be compelled specifically to perform as to his purchase of the other parcel.

Whether specific performance with money compensation for an inchoate right of dower, can be awarded in case of an exchange of lands as well as in case of a purchase, — Query?

Plaintiffs and defendant agreed to exchange certain parce's of real estate, but the defendant, being unable to fulfill his agreement on account of the refusal of his wife to release her dower (although he in good faith endeavored to induce her to do so),—Held, that the defendant should not be compelled to give a deed by himself, and indemnify the plaintiff against his wife's contingent right of dower, but the plaintiffs would be given damages for the breach of the contract.

As the Code of Procedure authorizes the uniting in the same complaint of causes of action both legal and equitable where they arise out of the same transaction, if the complaint states facts giving an equitable cause of action and also a legal cause of action arising out of the same transaction, a party is entitled to have the issues in both causes tried, if necessary to obtain his rights, and although he fail to make out a case for purely equitable relief,

yet if he prove facts showing a legal cause of action his complaint should not be dismissed, but money damages awarded him.*

Appeal from a judgment.

This action was brought in the New York common pleas by Mayer Sternberger, Simon Sternberger and Raphael Buckman against Owen McGovern, for the purpose of foreclosing a vendor's lien for the purchase money claimed to be due on a sale of real estate in the city of New York. The facts of the case were as follows:

On March 16, 1872, the plaintiffs and defendant executed a written instrument by which the plaintiffs agreed to sell to the defendant certain land situated in Thompson-street in New York city, "for the price of one hundred and twenty-five thousand dollars payable as follows:" twenty thousand dollars by the assumption by the purchaser of two mortgages on the premises; sixty-four thousand five hundred dollars by a deed from the defendant and his wife of a piece of land at Mott Haven "hereinafter more particularly described," and the balance, forty thousand five hundred dollars, by the bond of the defendant secured by a mortgage on the Thompson-street property. By the same instrument the defendant agreed to sell to the plaintiffs the Mott Haven property before mentioned, "at the price or consideration of eighty-two thousand five hundred dollars," of which eighteen thousand was to be paid by the assumption by them of a mortgage for that amount, and the balance "by the deed hereinbefore mentioned." The instrument provided a time and place at which the deeds were "to be exchanged," and provided for their form and manner of execution. By a subsequent mutual agreement in writing the time for the comple-

^{*} See also Hale v. Omaha National Bank, 49 N. Y., 626, reversing 33 N. Y. Superior Ct. (1 Jones & S.), 40.

tion of the contract was changed to a more distant day, and on that day, and at the appointed place, the plaintiffs had ready for delivery to the defendant a deed duly executed, and tendered performance of the agreement on their part. The defendant did not attend at the time and place agreed upon, and wholly failed to perform the agreement on his part. The defendant was unable to make a conveyance of the premises he had contracted to convey, by reason of his wife's refusal to join in a conveyance thereof, or to release her inchoate right of dower therein, although he in good faith endeavored to induce her to do so. This fact was known to the plaintiffs before the action was brought.

The complaint treated the agreement as an agreement by the defendant to purchase the Thompsonstreet property for one hundred and twenty-five thousand dollars, and plaintiffs tender as passing the title to the defendant, and asked that it should be sold under the direction of the court, and the net proceeds thereof be paid to the plaintiffs and credited upon the amount due for purchase money, and that they might have judgment against the defendant for one hundred and five thousand dollars (the amount of the purchase money less the mortgages on the property), and interest. &c.

The common pleas at special term sustained the view of the agreement taken by the complaint, and held that the plaintiffs were entitled to a specific performance thereof, and to insist that the defendant should accept the conveyance tendered, and pay the consideration money of one hundred and twenty-five thousand dollars, and that the plaintiffs had a lien on the property for the payment thereof, and ordered a reference to compute the amount due, and that if within ten days from the coming in and confirmation of the referee's report, the defendant should fail to pay the amount re-

ported due, that the referee should sell the premises at public auction or so much thereof as should be sufficient for the payment of the amount due from the defendant with interest, &c.

On appeal from the judgment entered on that decision, the court at general term held, reversing the judgment of the special term, that the agreement was not one for a sale of land but for an exchange: that as the plaintiffs had not parted with the possession of the property, they could not maintain an action to enforce a vendor's lien for the price, and that, as the inability of the defendant to perform specifically was known to the plaintiffs before the action was brought (and was stated in the complaint), there was no case presented for the interposition of a court of equity, and the complaint should have been dismissed and the plaintiffs left to bring an action at law for damages (see the case at general term, reported in 4 Daly, 456). From the judgment entered on that decision this appeal was taken to the court of appeals.

Everett P. Wheeler, for the appellants.-I. The judgment of the special term was correct. 1. If A. agrees to sell to B., and B. to buy of A., any specific property, real or personal, and B., at the time fixed for the completion of the contract, fails to perform, A. has the right: First, to retain his ownership of the thing agreed to be sold, and bring an action for damages caused by B.'s non-performance; or, Second, to hold for B.'s benefit the thing agreed to be sold, and to bring an action against him for the price. This rule is well settled as to personal property (see 3 Pars. on Con. 209; Bement v. Smith, 15 Wend., 493). As to real property a difficulty was at first raised, owing to some supposed embarrassment from the doctrines as to the transfer of title to real estate. But the courts finally settled the reasonable principle, that the effect

of the suit for the price following the tender of the deed was to vest the title to the land in the grantee named in the deed. His contract to accept it, followed by the election of the vendor to insist on such acceptance, as expressed by bringing his action for the price, is equivalent to an actual acceptance (Richards v. Edick, 17 Barb., 260; Franchot v. Leach, 5 Cow., 506; Johnson v. Wygant, 11 Wend., 48; Shannon v. Comstock, 21 Id., 461; Parker v. Parmele, 20 Johns., 130; Alna v. Plummer, 4 Greenl., 258). This is analogous to the well settled rule that in equity the vendee is considered as the owner of the land, and the vendor before conveyance as holding the legal title in trust for his benefit. The vendee's interest therefore descends to his heirs, and does not pass to his executors (Champion v. Brown, 6 Johns. Ch., 398; Havens v. Patterson, 43 N. Y., 218, 221). 2. If, under the contract, the price is to be paid, not in money, but in some other property, or if, in other words, the contract is for an exchange of one piece of property for another, the party who is ready and willing to perform on his part has the same option as that stated under the first rule. 3. In the latter case A. recovers the value of the piece of property which B. has agreed to convey to him. 4. If this value is fixed by the contract, such valuation is at least prima facie the measure of his recovery (Thomas v. Dickinson, 12 N. Y., 364; S. C., on new trial, 23 Barb., 431; Johnson v. Hathorn, 2 Abb. Ct. App. Dec., 465; S. C., 3 Keyes, 126, and 2 Id., 476). 5. The inability of B. to do the specific thing agreed to be done, does not excuse him. This elementary proposition is really the turning point of the case, The defendant agreed to pay part of the consideration money by conveying the Mott Haven property. He agreed that his wife should sign the deed. He is bound by this contract. True, the court will not shut him up in jail for non-performance. But it will require

him to pay the value of the land which he has agreed to convey. "Money answereth all things." For the sake of public policy, coercion upon the wife, through the husband, will not be employed. But the inability of the husband is in no other respect a defense (Phelps v. Pumpelly, 40 N. Y., 59; Chitty Con., 740; McNeil v. Reid, 5 Bing., 68; Worsley v. Wood, 6 Term Rep., 710; see also, School District v. Dauchy, 25 Conn., 530; Tompkins v. Dudley, 25 N. Y., 272). 6. If the payment in the case stated in the second rule is to be made, partly by the conveyance of property and partly by the bond or note of B., and he neglect or refuse to give such bond, the amount for which such bond or note was to be given becomes payable at once (Chitty Con., 441; 3 Pars. Con., 211; Hanna v. Mills, 21 Wend., 90). 7. In all cases where the vendor retains possession of the thing sold, he has a lien upon it for the unpaid purchase money (2 Story Eq., § 1216; Benj. on S., 657). The doubt arose whether equity would follow the common law, which terminated the lien when the vendor delivered possession to the vendee. It was finally decided that equity would recognize and enforce such a lien where land was the subject matter of the contract, although the vendor parted with the possession. It was argued below that no such lien exists where the purchase price is to be paid in land. The true doctrine of the cases on the subject is this: Where the vendor has accepted securities of any description, other than the personal obligation of the vendee, in payment of the price, the lien is gone, because the price is paid. If the defendant had conveyed the Mott Haven property, and given his bond secured by mortgage on the Thompson-street property, he would have paid the price. For any failure of title to the Mott Haven property, the Sternbergers would have been confined to their remedy on the defendant's warranty. But the land has not been conveyed. The

bond and mortgage have not been given. All that the vendor now has is the vendee's personal obligation to pay the purchase money; and it is perfectly well settled that this does not discharge the lien (2 Story Eq., § 1226; Sug. Ven. & Pur., ch. 19, §§ 13, 15 [pp. 675, 676, 14 Eng. ed.]; Winter v. Lord Anson, 3 Russ., 488; Garson v. Green, 1 Johns. Ch., 308; Manly v. Slason, 21 Vt., 271).

II. Should the court, however, be of opinion that the plaintiffs have no lien in this case, they have a clear right to judgment for the unpaid purchase money, as shown by the cases already cited. The defendant, by going into the trial before a single judge without demanding a jury and without objection, waived a jury (Greason v. Keteltas, 17 N. Y., 491; Davis v. Morris, 36 Id., 569; Barlow v. Scott, 24 Id., 40; Moffat v. Moffat, 10 Bosw., 468, 492). The cases cited by the defendant hold, that where the plaintiff neither avers nor proves facts sufficient to entitle him to a judgment at law, the judge cannot refer the case to enable the plaintiff to prove and recover damages. They hold that the legal remedy in such case is not within the scope of the case made by the complaint. But the court of appeals held unanimously, in Bradley v. Aldrich, 40 N. Y., 504, one of the cases cited by defendant, that the plaintiff might, by proper averments in his complaint, unite the legal and equitable causes of action. So, also, Johnson v. Hathorn, 2 Abb. Ct. App. Dec., 465. In such a case, even if the defendant had demanded a jury trial, and this had been improperly denied, he is not entitled to dismiss the complaint, but only to have the case sent to a jury to be tried (Stevenson v. Buxton, 37 Barb., 13; Genet v. Howland, 45 Id., 573).

III. The plaintiffs were entitled to a specific performance of the contract of the defendant to convey the Mott Haven property so far as he could do so,—i. e.,

to a conveyance by himself and compensation for the refusal of his wife to join in the deed (Story Eq., §§ 778, 779; Harsha v. Reid, 45 N. Y., 415; Waters v. Travis, 9 Johns., 450; Vorhees v. De Meyer, 2 Barb., 37; Fry on Spec. Perf., § 209; Story Eq., § 736a; Worrall v. Munn, 5 N. Y., 229; White v. Schuyler, 1 Abb. Pr. N. S., 300; McCrea v. Purmort, 16 Wend., 460; In re Hunter, 1 Edw. Ch., 1; Lobdell v. Lobdell, 36 N. Y., 327; Sands v. Crooke, 46 Id., 564; Story Eq., § 775; Davis v. Hone, 2 Schoals. & L., 341; Seymour v. Delancey, 3 Cow., 445).

T. C. T. Buckley, for respondent:—I. No case is made for equitable relief; at all events, to the extent asked for. 1. The contract not having been executed, the court will not decree in favor of a lien with the incident of foreclosure and sale, unless it be a case in which the contract would be decreed to be specifically performed (Clark v. Hall, 7 Paige, 385). 2. The agreements being mutual, and the defendant being, without fault, unable to convey the Mott Haven property free from his wife's dower, and plaintiffs being unwilling to take it with that incumbrance, the court in the exercise of its discretion would not compel specific performance, where that would involve the husband in the necessity of procuring his wife's release of dower, under the penalty of being mulcted with the purchase price (Story Eq. Juris., § 731; 1 Sugd. on Vend., 7 Am. ed., 232, marg. paging, and cases cited; Hill. on Vend., 57). 3. There can be no lien except where the purchase money is payable in cash, as that term is understood in the law (Hovt v. Van Alstyne, 15 Barb., 568; see, also, 11 N. Y. Leg. Obs., 258). 4. At all events, so far as the portion of the contract price represented by the Mott Haven property is concerned there can be no lien (McKillip v. McKillip, 8 Barb., 552, 558; Coit v. Fougera, 36 Id., 195; Hare v. Van

Deusen, 32 Id., 95; Arlin v. Brown, 44 N. H., 102; Chapman v. Beardsley, 31 Conn., 115). 5. It is clear that the plaintiffs have now no better claim for a lien than they would have, in case the defendant had, in fact, taken their deed of the Thompson-street property and had failed to convey in exchange the Mott Haven property, and to execute the purchase-money mortgage as agreed. But the authorities are uniform that a vendor who takes, or agrees to take in payment, instead of cash, chattels, or securities, such as a mortgage on other land, or a mortgage even on the land sold, will be deemed to have waived the security of his vendor's lien (Fish v. Howland, 1 Paige, 20, 30; Coit v. Fougera, 36 Barb., 195; Selby v. Stanley, 4 Min., 65; Baum v. Grigsby, 21 Cal., 172; Camden v. Vail, 23 Id., 633; Mattix v. Wells, 18 Ind., 141).

GROVER, J.-The different conclusions arrived at by the special and general terms arose from the different construction of the contract of the parties which was respectively adopted. The special term held that the contract of the plaintiffs to sell and convey to the defendant the Thompson-street property for one hundred and twenty-five thousand dollars, was an independent contract not affected by that part relating to the Mott Haven property otherwise than by giving the defendant the right of paying a part of the one hundred and twenty-five thousand dollars by conveying the same to the two plaintiffs at the price specified. If this is the true construction, the judgment of the special term to the effect that the plaintiffs were entitled to a specific performance as to the Thompson-street property, irrespective of the ability of the defendant to perform that part of the contract relating to the Mott Haven property, was correct; and the only remaining question would be whether the mode of enforcing performance of this contract was proper under the facts of

The general term construed the contract as the case. entire, in substance;—one for the exchange of the one property for the other, and the giving the bond and mortgage by the defendant to the plaintiffs upon the Thompson-street property, as the mode by which the estimated excess of the value of that over that of the Mott Haven property was to be adjusted. If this is the true construction it is obvious that a specific performance of the contract as to the Thompson-street property could not be enforced against the defendant, while he was unable to perform as to the Mott Haven property. In other words, the defendant having, by this construction, agreed to exchange the Mott Haven property for the Thompson-street property, and to give the plaintiffs a mortgage upon the latter for its estimated excess in value over that of the former, -- and, being unable to give a good title to the Mott Haven property, or such title as the plaintiffs were willing to accept, -could not be compelled to take title to the Thompson-street property, and pay the sum in cash therefor which had been inserted in the contract as its price, but which was inserted as a mode of arriving at the difference in value of the respective properties.

I think the construction adopted by the general term was the one that was intended by the parties; that the contract was one for an exchange;—not one binding the defendant to purchase the Thompsonstreet property, giving him an option to pay a large portion of the purchase money by conveying the Mott Haven property as provided by the contract, or of paying that portion in money; and binding the plaintffs to purchase the Mott Haven property, giving them an option of paying therefor, by conveying the Thompson-street property, or in cash:—in other words, not a contract binding each to purchase the property of the other, at the prices named in the contract, but binding neither to sell unless he chose. The language of the

contract shows that this was not the intention of the parties. By that, each of the parties expressly agree to sell and convey their respective property as specified in the contract. It is much more explicit in this respect than in the agreement to purchase that being left to inference from the general language of the contract. construe the contract as requiring each to purchase at the option of the other, but requiring neither to convey unless he chose so to do, would wholly defeat the intention of the parties, and yet this is the result of the construction adopted by the special term. By that, the defendant was held bound to take the Thompson-street property, and in case of failure to convey, as specified, the Mott Haven property, to pay the sum specified as the value of the former in cash. Under this construction, the plaintiffs, if unable to give title to the Thompson-street property, might have been compelled to take the Mott Haven and pay cash therefor. As above remarked, this would entirely defeat the intention of the parties, as appears from the language of the entire contract. That shows that the object was to exchange the one property for the other, the defendant paying the estimated excess in the value of the plaintiffs' property to them. This being so, the contract was entire, and a specific performance of a part only cannot be awarded. This shows that the judgment of the special term was erroneous.

But the counsel for the appellants insists that assuming this to be the true construction, he was entitled to a specific performance of the entire contract, and that, as the defendant had agreed that his wife should unite in the conveyance of the Mott Haven property so as to bar her right of dower, and it appearing that she refused so to do, he was entitled to a conveyance from the defendant of the property, and to have deducted from the price the value of the inchoate right of dower. No such claim was made upon the trial, but if

the plaintiffs are entitled to this relief they can obtain it upon a new trial. The question must therefore be decided. The counsel cites numerous authorities showing that where a vendor is unable to perform the entire contract, the purchaser may, if he chooses, enforce performance of that part which the vendor can perform, and recover compensation for the part unperformed. I have examined these, and find that in general they are cases where there is a failure of title in the vendor to a part of the premises agreed to be conveyed, and where a proper deduction from the purchase price can be ascertained and determined, so as to do complete justice between the parties in the case before the court. Where this cannot be substantially done it is obvious that specific performance ought not to be decreed, as this should be done only where the court can see that the ends of justice require it. Peters v. Delaplaine, 49 N. Y., 362,—which was an action for specific performance, and where the question was whether the action was barred by the statute of limitations, and whether the relief should not be denied on the ground of delay in commencing the action, which was attempted to be excused by reason of the inability of the defendant to procure a release of dower from his wife at the time the premises should have been conveyed,-it is said, page 368, "The seller could not have compelled the purchaser to accept such defective title with indemnity for the incumbrance, but the latter had an option to accept it or rely upon his action for damages. He could have brought his action for specific performance at once, and taken such judgment as would have secured to him the full benefit of his contract, and the property for which he contracted for." Citing several authorities. follows shows that, in the opinion of the learned judge, the vendor in such a case would be compelled to convey, and in some form not specified indemnify the pur-

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chaser against the contingent rights of dower of the wife. In Woodbury v. Luddy, 14 Allen, 1, it was held, that the purchaser might, in such a case, compel the vendor to convey with a deduction from the' price of the fair value of the inchoate right of dower of his wife who refused to release the same, but that such deduction was not the difference in the market value of the property with a perfect title and its value subject to such right, and that the value of this right should be determined by the tables of mortality. In Davis v. Parker, Id., 94, a similar judgment was given. The point was not directly involved in Peters v. Delaplaine, supra, nor have I found any case in this State in which it has been determined in an action for a specific performance, that a purchaser may compel a vendor, unable to procure his wife to release her dower, to convey subject to such right, and abate from the price such a sum as the court determined was its value. But be this as it may the application of the doctrine in this case would work injustice. Here the parties have agreed to exchange in substance one parcel of real estate for another, and contracted for the payment by the defendant to the plaintiffs of the estimated excess in value of their parcel by giving a second mortgage thereon payable in future, the value placed upon each parcel not being its estimated cash value but its relative value with the other parcel, no cash payable by either. Under such a contract, to require the defendant to convey the Mott Haven property to the plaintiffs, and pay such compensation as the court should determine its market value was impaired by the outstanding inchoate right of dower, or such sum as the real value of such right, ascertained by the tables of mortality, would be harsh and oppressive. The defendant never made a contract to do this. To charge him with the difference in the market value would be unjust, as it is obvious that this incumbrance

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upon the title would impair that to a much greater extent than the real value of the right. To compel him in effect to purchase the right by paying the plaintiff therefor its value determined by the tables of survivorship and mortality, would in a case like this be unjust. He, as we have seen, contracted for an exchange of his property for that of the plaintiff. Under such a contract he ought not to be compelled to take the risk of the loss to which the application of those tables to this particular case might subject him. These tables, when applied to a great number of cases, will in the aggregate show correct results. Hence they may be used by life insurance companies with safety in fixing their rates, and are resorted to by courts when the probable duration of life must be determined in adjusting the rights of parties. But to determine the value of the inchoate right of dower in this way for the purpose of enforcing the specific performance of a contract for the exchange of real estate with compensation, would be unsustained by precedent or sound principle. My conclusion therefore is that upon the facts found by the special term the plaintiff was not entitled to the specific performance of the contract or any part of it. plaintiff must resort to his legal remedy for the damages, if any, that he has sustained from the defendant's breach of the contract. The remaining question is whether the general term ought not to have ordered a new trial instead of giving final judgment dismissing the complaint. It appears from the opinions that the latter course was adopted for the reason that it appeared upon the trial that the plaintiffs were aware, at the time of the commencement of the action, that the defendant could not perform the contract, and that in such a case equity would not retain the suit for the purpose of awarding damages which could be recovered in an action at law. This was the rule prior to the adoption of the Code (Morse v. Elmendorf, 11 Paige,

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277). But the Code authorizes the uniting in the complaint of causes of action both legal and equitable arising out of the same transaction (Bradley v. Aldrich, 40 N. Y., 504, 512). The facts constituting these causes of action must be stated in the complaint. The court held in that case that no facts constituting a legal cause of action were stated in the complaint, and that as the plaintiff failed to prove the equitable cause of action

stated, the complaint was properly dismissed.

This shows that where the complaint states facts giving an equitable cause of action, and also a legal cause of action arising out of the same transaction, the party is entitled to have both tried if necessary to obtain his rights. That is this case. The complaint sets out the contract, and alleges a tender of performance by the plaintiff and a breach by the defendant, and demands judgment for one hundred and twenty-five thousand dollars, and other relief. True, he demands equitable relief based upon the ground that he was entitled to a specific performance of that part of the contract relating to the Thompson-street property. He railed in showing a right to this. He then had a right to a trial of his claim for damages sustained by the breach. True, the mode of trial may be different. The former must be tried by the court or a referee unless some question or questions of fact involved are ordered by the court to be tried by jury. Either party has the right to a jury trial of the latter. This creates no practical difficulty. The one issue may be tried by the court and the other by jury if the ends of justice require the trial of both, or both may be tried by the court or a referee if the parties so desire. The judgment of the general and special terms must be reversed and a new trial ordered, costs to abide event.

FOLGER and A. S. JOHNSON, JJ., concurred.

ALLEN, J., concurred in the result, in view of the peculiar circumstances of the case, without, however, passing upon the question whether specific performance with money compensation for inchoate right of dower may not be awarded in cases of exchange, as well as upon a contract for the purchase, of real property.

CHURCH, Ch. J., and Andrews, J., expressed no opinion; RAPALLO, J., absent.

Judgment reversed, and a new trial ordered; costs to abide event.

ADRIENCE against LAGRAVE.

Supreme Court, First District; Special Term, March, 1874.

ARREST.—Service of Process.—Fraud in Bringing Defendant Within Jurisdiction.

Where a person is brought by fraud within the jurisdiction of the court, creditors who did not participate in the fraud, may serve summons upon him, and in the action thus instituted, may resort to all the auxiliary remedies which the law gives, —e. g., arrest.

The presumption being in favor of the jurisdiction of the court, if the creditor who effects such arrest explicitly denies in his affidavit that he was a party to the arrangement by which defendant was wrongfully brought within the jurisdiction, the defendant's motion to set aside the arrest should be denied.

In two actions—one by James B. Adrience, and others, and the other by Herman Bacharch, and others, against Alfred E. Lagrave, the defendant moved to set

aside the service of the summons and complaints, and to vacate the orders of arrest, which had been granted.*

Charles W. Brooke, for the motion.

D. M. Porter & L. A. Gould, for plaintiff, opposed. -I. A general appearance waives all objections to inrisdiction, and to defects in process, and service even such as would otherwise be fatal (Pixley v. Winchell, 7 Cow., 366). Where a defendant appears, though the process be void, and he is ignorant of the fact, at the time of his appearance, yet the court will not afterwards set that or the subsequent proceedings aside (Coppernoll v. Ketcham, 56 Barb., 113). The service of an order of arrest, when defendant is exempt from arrest, cannot be set aside if defendant does any act towards an acceptance or appearance (Petrie v. Fitzgerald, 1 Daly, 405; Ballouhey v. Cadot, 3 Abb. Pr. N. S., 122; Dix v. Palmer, 5 How. Pr., 233; Flynn v. Hudson R. R. R. Co., 6 Id., 309; Webb v. Mott, 1d., 439; Allen v. Malcolm, 12 Abb. Pr. N. S. 335; Murray v. Vanderbilt, 39 Barb., 140).

II. The defendant has appeared in these actions generally. He has so appeared by indorsements and signatures of his attorney, generally, and by putting in and serving notice of justification of bail in each of the actions (Baxter v. Conklin, 9 How. Pr., 445; Dole v. Manly, 11 Id., 138; Kelsy v. Covert, 15 Id., 92; Ayres v. Western R. R. Co., 48 Barb., 133; Quin v. Tilton, 2 Duer, 648; Quick v. Merrill, 3 Cai., 132; McKensler v. Van Zandt, 1 Wend., 13; Cooley v. Lawrence, 12 How. Pr., 176; also cases cited supra).

III. The defendant avers on information and belief only, that the plaintiffs had something to do with his being brought back to this country; this they positively and fully deny. The burden of proving any such

^{*}The facts fully appear in our report of somewhat similar proceedings, in Lagrave's case, in 14 Abb. Pr. N. S., 333, 234.

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fraud against the plaintiffs lies upon the defendant who asserts it; he has wholly failed to prove it (Henry v. Henry, 8 Barb., 588).

IV. The defendant was brought into this State, as the papers show, as a fugitive from justice, upon a criminal charge, from which the order of Judge Fancher does not discharge him. An order of arrest issued against him after he is so brought within the jurisdiction of the court, will not be set aside (Williams v. Bacon, 10 Wend., 636).

V. The language used in the opinion of Mr. Justice Daniels, relied on by the defendant, was wholly obiter. Without any act or default whatever on their part, how can it be pretended that the defendant may escape the just and legal consequences of a fraud against them, because other parties have committed a fraud against him? It is not denied that plaintiffs have a cause of action, and they are therefore entitled to arrest. If fraud brought the defendant within reach of his own victims, and enabled them to seize his person, his remedy is against the parties who enticed him.

VI. But it appears that when the orders of arrest were issued in these actions, the defendant had been long discharged from custody under the alleged fraudulent orders of arrest, and was at liberty, so far as they were concerned, to return to France. He failed to do so; the plaintiffs, upon just grounds, and finding him here, like any fraudulent debtor, took the measures provided by law against him.

LAWRENCE, J.—The defendants, at the time the summons and complaint, and orders of arrest, in these actions were served upon him, was within this State, and, therefore, presumptively subject to the process and orders of this court. To sustain the claim that the defendant was not, at the time of the service of the summons and complaint and orders of arrest, subject

to the jurisdiction of this court, it is alleged by the defendant in his moving affidavits, that the plaintiffs in these actions were parties to the alleged fraudulent arrangement or conspiracy between one James Mooney and various creditors of the defendant, in pursuance of which, the defendant was kidnapped in France, by Mooney, and, by a requisition on a criminal charge, extradited to this State; that the design of bringing him within the jurisdiction was in order to arrest and hold him to bail in civil actions.

So far as these creditors of the defendant, who are parties to such arrangement, are concerned, this court has already held that the defendant was entitled to be discharged from arrest in suits brought by such creditors, on the ground that an arrest procured by a trick or fraud is illegal (See Lagrave's case, 14 Abb. Pr. N. S., 336, and cases cited in opinion of FANCHER, J).

In these cases, however, the allegations in the defendant's affidavits, that the plaintiffs were concerned in, or parties to the trick or device by which the defendant was transported from France to this State, are flatly denied, and it seems to me, therefore, that the defendant cannot, as against these plaintiffs, claim that his person had been wrongfully brought within the jurisdiction of this court.

In the case of this defendant, Judge Davis held that a creditor who has not participated in the wrongful proceedings against the defendant, might lawfully serve him with a summons in a civil action (Lagrave's case, 14 Abb. Pr. N. S., 314).

I see no good reason why, if such a creditor can serve the defendant with a summons, and thus institute a civil action against him, he is not entitled to resort to all the remedies which the law gives to the plaintiff, as incidental or auxiliary to such action. If the defendant is subject to the process of the court for the purpose of commencing the action, it seems to me con-

clusively to follow, that he is amenable to all orders and processes which may naturally arise and grow out of such action. It being, therefore, denied by the plaintiffs, that they were parties to the arrangement by which the defendant was wrongfully brought within the territory of this State, and the presumption being in favor of the jurisdiction of the court, and it being also incumbent upon the defendant to establish affirmatively that he was not within nor subject to such jurisdiction at the time of his arrest, and of the service of the summons and complaint, I am of the opinion that these motions should be defied.

Motions denied, with ten dollars costs in each case.

FARMERS' BANK OF FAYETTEVILLE against HALE.

Supreme Court, Fourth Department; General Term, March, 1874.

USURY.—PENALTY.—FORFEITURE OF INTEREST.—Inconsistent Statutes.

By the act of 1870 (1 Laws of 1870, ch., 163, 7 Edm. Stat., 663), the usury law of this State is in effect repealed as to State banks organized under the banking law of 1838.

The usury law (1 R. S. 772, § 5), declared that all securities, &c., whereon there should be reserved a greater rate of interest than that above described [7 per cent.] should be void. The act of 1870, as to banking associations, provided that they might take seven per cent. in advance, and declared that their knowingly receiving a greater rate should be held and adjudged a forfeiture of the entire rate of interest; and repealed all inconsistent provisions. Held, that the forfeiture of the whole debt was inconsistent with the forfeiture of interest merely, and was repealed thereby in respect to such banks as lenders.

Such a bank, by receiving more than seven per cent. interest, only forfeits the entire interest, and may recover the principal.

Plaintiffs sued Mark Hale, as the maker, and Hezekiah Cass, as the indorser of a promissory note for one thousand three hundred and fifty dollars, payable at the plaintiff's bank. The note was dated October 18, 1872, and payable one month after date.

The plaintiffs were an association organized under the general banking law of this State, enacted in 1838.

The parties agreed upon, and submitted to the court the following facts. That Cass had been duly charged as indorser, and both the defendants were liable to the plaintiff for the amount of the note, unless the note was void for usury.

The note was an accommodation note indersed by Cass, without consideration, and Hale, the maker, obtained from plaintiffs a loan thereupon, on usury, namely: The sum of thirteen dollars and fifty cents, in addition to legal interest, the payment of which was imposed by the plaintiffs on Hale, as the condition of their making the loan or discount.

At circuit, judgment was given for plaintiffs for the amount of the loan and costs, for the reasons assigned in the following opinion.

The defendants appealed.

Lyman & James, for defendants, appellants.—I. The law has not made any distinction between this and other defenses, and the court can make none (Catlin v. Gunter, 11 N. Y. [1 Kern.], 375; Potter's Dwarris, 148, and note 2, same page; Sedg. Cons. and Stat. Law, 336, 337). Hence, there is no reason for leaning toward the construction which repeals the usury law.

II. The rate allowed to be taken in advance by banking associations was six per cent. (2 Rev. Stat., 535, § 98, 5 ed.) When not taken in advance, seven per cent.

(3 Rev. Stat., 72, §§ 1, 2, 5 ed.). If such associations charged a greater rate, the debt was rendered void (3 Rev. Stat., 73, § 5, 5 ed.; Bank of Salina v. Alvord, 31 N. Y., 473). In addition the person receiving the same was liable in an action to refund the amount taken in excess of lawful rate, if brought within one year (3 Rev. Stat., 72, § 3, 5 ed.). The changes effected by Laws of 1870, ch. 163, allow State banks to charge in advance at seven per cent. One paying in excess may recover back twice the amount of interest paid, if the action is brought within two years (Laws of 1870, ch. 163, § 1). Thus section 98, 2 Rev. Stat., 535, 5 ed., is made to read: Banking associations may charge and receive seven per cent. in advance on loans of money; and section 3, 3 Rev. Stat., 72, to read: If a greater rate is charged and received, the person paying the same may recover back twice the amount of interest paid if the action is brought within two years. And section 5, 3 Rev. Stat., 73, 5 ed., making void the debt if a greater rate is charged, remains unchanged and still in force, by Laws of 1870, ch. 163. But it is claimed by the respondent that Laws of 1870, ch. 163, repeals sections 3 and 5, 3 Rev. Stat., 72, 73, and section 98, 2 Rev. Stat., 535, 5 ed. The appellants admit that the act of 1870 repeals section 98, and that it modifies section 3 so far as it relates to State banking associations, but claim that it does not repeal section 5. This leads us to an examination of the respective statutes, and the construction to be put upon them. The first question that arises is: What, if any, is the intent of the legislature as expressed in the statute of 1870, chapter 163. The intent is expressed in section 2 of the act, where it is "declared that the true intent and meaning of this act is to place the banking associations organized and doing business as aforesaid (under the act of 1838), on an equality in the particulars in this act referred to, with the national banks organized

under the act of Congress entitled or approved June 3, 1864." Section 30 in the national banking act is referred to, which allows banks to charge seven per cent, in advance, and if excessive interest is charged, twice the amount may be recoved back if the action is brought within two years, and the two sections of the respective acts are substantially alike (13 U. S. Stat. at L., 9, § 30: Laws of 1870, ch. 163, § 1). The legislative intent expressed in section 2 must control in construing this statute (Holmes v. Carley, 31 N. Y., 290, and cases cited: Potter's Dwarris Stat., 175, 110, 179, 181, 182, 236, 144; Vattel's Rules; No. 27; United States v. Palmer, 3 Wheat., 631; Story Con. of L., 10; 1 Kent Com., 461; Ogden v. Strong, 2 Paine, 584). The intent of the legislature is expressed in section 2. chapter 163, which says, "It is hereby declared that the true intent and meaning of this act is to place banking associations organized, &c., on an equality in the particulars in this act referred to with the national banks." The "particulars in that act referred to," are allowing State banks to charge and receive on loans of money seven per cent, in advance, instead of six per cent. That if an excess of interest was charged, &c., the person paying the same might recover back twice the amount of interest paid, instead of the amount paid in excess of six per cent., and that the action therefor might be brought within two years instead of one year. The legislature having declared the intent, the act does not repeal in express terms section 5, 3 Rev. Stat., 73, making void the debt if excessive interest is charged; and hence section 5 is not repealed unless by implication, which is not favored in law (Sedg. Cons. and Stat. Law, 127, and cases cited; Potter Dwarris on Stat., 154; Theriat v. Hart, 2 Hill, 380, and note; Williams v. Potter, 2 Barb., 316, 320). A mere change of phraseology will not alter the law (Theriat v. Hart, above; Matter of Brown, 21 Wend., 316, 319; Potter's

Dwarris on Stat., 181; Williams v. Pritchard, 4 Term R., 2, 4; Williams v. Williams, 8 N. Y. [4 Seld.], 532, 533). Here the expressed intent was, not to repeal the former statute in toto, but to place State banks "on an equality in the particulars in this act referred to with the national banks," &c. All acts in pari materia are to be taken together as if they were one law (Potter's Dwarris on Stat. 189, and note 9: 1 Kent Com. 463, 464, orig. page). The cause or reason of enacting the statute of 1870 was this: National banks were allowed to charge seven per cent. interest in advance on loans of money, and State banks only six per cent., making a difference of one per cent. in favor of the national banks, and to allow State banks to charge seven per cent, interest in advance, and thus gain one per cent. on the loans, was the reason or cause of passing the act of 1870. And this is a safe rule for construction (Sedg. Cons. and Stat. Law. 239, Potter's Dwarris on Stat., 186 Id. 188; 1 Kent Com., 462, orig. page; Holmes v. Carley, 31 N. Y., 290, and cases cited). At the time of the passage of the act of 1870, bankers generally supposed that national banks were free from the operations of our State usury laws; although the courts and the bar who had examined the act of Congress, section 30, act June 3, 1864 (13 Stat. at Large, 9), expressed different opinions in regard to it. The question how far national banks were controlled by State laws was then before the courts, and received an elaborate review in The National Bank v. Connor, 9 Wall. 362). But section 30 of the act prescribing the rates of interest for banks formed thereunder, had not then come before the courts for them to determine whether they were free from the penalties of State usury laws. But whether national banks were or were not free from the penalties of State usury laws, was not of so much importance and anxiety to State banks, as the fact that those banks were allowed to charge and receive

one per cent. interest in advance more than the State laws allowed State banks to do. It was not so much the penalty that the State banks wished to escape, as it was that they might be allowed to add the one per cent, additional interest in advance on their loans. It was the one per cent. additional interest the State banks were after. And because the legislature allowed these banks to charge the much coveted one per cent. additional interest in advance, they now ask this court to say the legislature thereby repealed all the former provisions of the statute in regard to usury, so far as the same relates to these soulless banking institutions. There is no reason for giving this statute of 1870 such a liberal construction in favor of banking associations, and construing them so strictly against individuals. Since the passage of the act of 1870, section 30 of the national banking act of June 3, 1864, has been before the courts for adjudication, and it was held that they were not free from the penalties of State laws (First Nat. Bank of Whitehall v. Lamb, 50 N. Y., 95; In the matter of Wild, U. S. Circuit Court, WOODRUFF, J., 8 Albany Law Journal, 235, 236). And from this fact it may be urged that had this decision been made prior to 1870, that statute would not have been passed. That does not follow. If the State banks under those circumstances could have induced the legislature to grant them the right to charge seven per cent, in advance instead of six, they would have been willing that section 3, 3 Rev. Stat., 72, should have been changed so that the party paying excessive interest could recover back twice the amount within two years, instead the amount in excess of the legal rate in a year. But whether they would or would not have asked the legislature to pass the act of 1870 under those circumstances, does not change the intent of the legislature now that the act is passed; and now that the act is passed and in force, those banks are placed upon the

same footing with national banks, which are-(1) National banks may charge and receive interest on loans of money in advance at the rate of seven per cent. (2) Any person paying a greater rate of interest, may recover back twice the amount if the action is brought within two years. (3) All loans, notes, &c., on which shall be reserved, or received, or taken any greater sum. &c., shall be void (§ 5, 3 Rev. Stat., 73, 5 ed.). The position of the court below, "that a legislative construction was given to the act of Congress, and such construction adopted and incorporated in the legislative enactment," &c., is unsound. A legislature cannot authoritatively interpret or declare what the law is or has been, but only what it shall be (Ogden v. Blackledge, 2 Cranch, 272; Ashley's Case, 4 Pick, 23. There is no such inconsistency between the two statutes. that the latter is a repeal of the former. If there is an apparent inconsistency, such construction must be put upon them that both can stand if possible (Potter's Dwarris on Stat., 189; Johnson v. Byrd, Hempstead, 434; Beals v. Hale, 4 How. U. S., 37; Parish of St. Clemens v. St. Andrews, 6 Mod., 287). When the intent can be collected from the statute itself, words may be modified, or supplied so as to obviate repugnancy or inconsistency with such intention (Quin v. O'Keefe, 10 Ir. C. L. R., 393). The change effected by the act of 1870 is in effect to make section 2 of 3 Rev. Stat., 72, to read, Twice the amount of interest paid, if brought within two years, And section 98 of 2 Rev. Stat., thus: Banking associations may charge seven per cent, interest in advance on loans of money. These two changes do not make two acts so far inconsistent with each other that section 5 above is thereby repealed (The King v. The Poor Law Comr., 6 A. & E., 7, 8, and cases above cited; Williams v. Pritchard, 4 D. & E., 2; Williams v. Williams 8 N. Y. [4 Seld.], 532, 533, and cases cited. If

the act of 1870 repeals section 5 above, it also must repeal section 4, 3 Rev. Stat., 73, which allows the action to be brought within three years, if brought by the poor commissioners, &c. The general repealing clause: "And all acts and parts of acts inconsistent with the provisions hereof, are hereby repealed,"-does not repeal section 5. What are the "provisions hereof?" The provisions are, That State bank may charge seven per cent, interest in advance instead of six, as heretofore. That the party paying excessive interest may recover back twice the amount of interest paid if the action is brought within two years, instead of the amount in excess of the legal rate if brought within one year. These are the only provisions of the act of 1870; and the provisions of the former statute making void the debt if excessive interest is charged, is not referred to either directly or indirectly. And solely because of these two changes, this court is asked to hold that the act of 1870 repeals section 5, 3 Rev. Stat., 73, 5 ed., making void the debt if an excessive rate of interest is charged and received for loans of money.

The general law of the country is not altered or controlled by partial legislation, made without any special reference to it (Denton v. Manners, 4 Johns., 151). General words of a statute do not always extend to every case which falls literally within it (Cope v. Doherty, 2 De G. & J., 614; Minit v. Leman, 20 Beav., 269). The rule is, that wherever there is a particular enactment and a general enactment, and the latter taken in its most comprehensive sense would overrule the former, the particular enactment must prevail (Pretty v. Solly, 26 Bear., 610). This rule is well illustrated in the act of parliament which authorized individuals to inclose and embank portions of the soil under the river Thames, and declared that such land should be "free from all taxes and assessments whatsoever." The land tax subsequently passed, by gen-

eval words embraced all the land in the kingdom; and the question which came before the court was whether the land mentioned in the former act had been legally taxed, and it was held that the tax was illegal (Williams v. Pritchard, 4 D. & E., 2; Williams v. Williams, 8 N. Y. [4 Seld.], 532, 533, and cases there cited; Denton v. Manners, 4 Jur. N. S., 151; Brown v. Wright, 1 Green, 240; Canal Co. v. Railroad Co., 4 Gill & J., 152).

L, C. Gardner, for plaintiffs, respondents:—I. The act of 1870 provides that the only penalty that can be imposed upon a bank organized under the laws of this State, for taking usury, is a forfeiture of the interest which the note or other evidence of debt carries with it, and a recovery in case it is actually paid, of twice the excess over seven per cent. interest. The last clause of this statute states in substance that the legislature intended to place State banks upon the same basis, in this respect, with national banks. At the time this statute was enacted the legislature may have supposed that the penalties imposed upon national banks were less severe than those applicable, under like circumstances, to individuals and to State banks. legislature may have misconstrued the meaning of an act of Congress does not weaken this statute. The legislature intended to do just what is stated in the first section of this law; the reason for their action is given in the second section, to wit: to place State and national banks upon the same basis in respect in said act named. By the same logic employed by RAPALLO, J., in the First National Bank of Whitehall v. Lamb, 50 N. Y., 95, Congress cannot interfere with State laws in respect to that part of the penalty which allows a recovery of interest over seven per cent., or in respect to the time within which action may be brought to recover same; and so if a national bank receives more

than the legal interest for the use or forbearance of money in this State, only the excess can be recovered by the borrower, and action must be brought within one year, the same as before the national banking law. Hence if defendant's position is correct, that the second clause of the act of 1870 is controling, to wit: that State and national banks are to occupy precisely the same position with regard to the particulars referred to therein, then this law is entirely nugatory. But even if it should be held that there was a change made by this statute of 1870, in the two incidental particulars named, still the construction contended for by the plaintiff would give but little effect to its provisions. Well established principles must govern the construction of this statute. 1. The whole act must be construed together (Potter's Dwarris on Stat., 193). 2. Statutes are to be construed so as to give them full force and effect (Alder v. Mil. Pat. Brick Co., 13 Wis., 57; Case of Alton Woods, 1 Coke, 45; People v. Utica Ins. Co., 15 Johns., 358; Holmes v. Carley, 31 N. Y., 290; Leversee v. Reynolds, 13 Iowa, 310). 3. The purview of an act may be qualified or restricted by a proviso or saving clause; this clause is only an exemption of some special thing out of the general things mentioned in the act, but a saving clause which is repugnant to the purview or body of the act, and could not stand without rendering the act inconsistent and destructive of itself, is void (Potter's Dwarris on Stat., 238; Sedg. on Stat., 60; 1 Black. Com., 88; 1 Kent Com., 462; Alton Wood Case, 1 Coke, 45; Walsingham's Case, 2 Plowden, 565; Millford v. Elliott, 8 Taunt., 13; Dugan v. The Bridge Co., 27 Penn. State, (3 Casey) 303; Minis v. United States, 15 Pet., 423; Voorhees v. Bank of the United States, 10 Id., 471; Wayman v. Southard, 10 Wheat., 30). 4. A saving totally repugnant to the body of the act is void (1 Black. Com., 88). 5. "It is a general principle that a

proviso or saving clause which is repugnant to the purview or body of the act is not to have effect (Dugan v. Bridge Co., supra). 6. A particular thing given by the preceding part of a statute shall not be taken away or altered by any subsequent general words (Sedg. on Stat., 61; Stanton v. University of Oxford, 1 Jon., 26). 7. When any particular construction would lead to absurd consequences it is to be avoided (Commonwealth v. Kimball, 24 Pick., 370; Mayor of Jeffersonville v. Weems, 5 Ind., 547; Smith Com., 664).

II. It is a legal right vested in the legislature to pass laws, to confer privileges and immunities, and to impose burdens, even though they may be unequal in their operations and effects, limited only by the constitution (Seg. on Stat., 183, 185; Kirby v. Shaw, 7 Harris, Penn., 258; In the matter of Wilson, 4 City H. Rec., 47; People ex rel. De Forrest v. Denniston, 23 N. Y., 247; Bank of Chenango v. Brown, 26 Id., 467; Luke v. City of Brooklyn, 43 Barb., 54; Anonymous, 1 Code R., 49). "As to cases being decided on grounds of policy or hardship, the idea has been repeatedly and vigorously condemned; the ground of public policy is a very unsafe one, it is best to adhere to the words used in the act of parliament (Sedg. on Stat. &c., 308; Dwarris on Stat. &c., 597).

III. As there is nothing in this act expressing whether it was the intent to place State banks upon the same basis with national banks organized within this State, or upon the same basis with those national banks located where there is no rate of interest fixed by local laws, we may suppose the latter was intended when we take into consideration the fact that by a previous section of the same act the legislature has declared "that the forfeiture should be limited to the interest, &c.," which is the same penalty (First National Bank of Whitehall v. Lamb, above) prescribed by act of Congress for national banks taking usury in those

States and territories where there are no usury laws; especially does such a construction receive additional force, from the fact that otherwise the whole statute would be nugatory and void.

By the statute of 1870, the legislature placed a construction upon the national banking law, and such a construction is entitled to consideration (Sedg. on Stat. &c., 488; Coutant v. The People, 11 Wend., 515; The People v. The Board of Supervisors, 16 N. Y., 424; Metropolitan Bank v. Van Dyke, 27 Id., 427; De Quindre v. Williams, 31 Ind., 444). The First National Bank of Whitehall v. Lamb (supra), was a decision upon a case tried before the statute of 1870, and therefore the decision was not influenced thereby.

THE COURT affirmed the judgment appealed from, and adopted as the ground thereof, the opinion below which was as follows:

Hardin, J.—The conceded facts present for determination the single question involved in this action. Does the charge and payment of thirteen dollars and fifty cents in excess of seven per cent. as a condition of the discount of the note mentioned in the complaint, render the note absolutely void in the hands of the plaintiff, or does it merely work a forfeiture of the entire interest which the note carries with it?

To determine this question it is necessary to give a construction to chapter 163 of the laws of this State passed April 9, 1870.

No judicial construction of the statute was cited on the argument in this case.

But it is claimed in behalf of the defendants, that the decision made by the court of appeals in First National Bank of Whitehall v. Lamb, 50 N. Y., 95, holding that no privilege or immunity from the usury laws of the State is conferred upon national

banks by the act of Congress of 1864, and a contract for a loan made in this State with one of these organizations, by which it reserves a greater rate of interest than seven per cent. is void, places these institutions upon an equality with individuals, and subject to the general statute of this State in respect to usury; that State associations like the plaintiff here are on an equality with national banks organized under the act of Congress.

Such construction of chapter 163 gives but little effect to its provisions. Some of its provisions would be wholly without effect or significance. It is a cardinal rule to be observed in the construction of a statute, that full effect or force should be given to all its provisions if possible (13 Wis., 57).

The first section in express terms confers authority npon such associations, "to take, receive, reserve and charge on every loan or discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate of seven per cent. per annum, and such interest may be taken in advance."

It also expressly limits the forfeiture in case the violation of the authority conferred shall take place.

"It expressly declares that the "knowingly taking a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon." It therefore appears that the statute has declared and limited the consequences of taking a rate greater than aforesaid.

That such is the limitation of the forfeiture contained in the act of Congress was assumed by RAPALLO, J., in delivering the opinion of the court in Bank v. Lamb, supra. The same words are used in the statute now under consideration, and the assumption of the court in respect to the extent of the forfeiture is therefore applicable and controlling here.

It must therefore be assumed that the first section

confers upon the State associations the right to reserve seven per cent. interest, and limits and defines the forfeiture in case a "greater rate is received."

This conclusion is strengthened by the subsequent provisions in section 2, in respect to repeal of other statutes. It declares that "all acts and parts of acts inconsistent with the provisions hereof are hereby repealed."

The provision of the general law declaring void all contracts when a greater rate than seven per cent. is reserved, manifestly is inconsistent with the provisions of the first section above quoted.

It therefore in express terms is repealed *quo ad* the associations organized like the plaintiff under the act of 1838.

So far, in the language already adverted to of the first section, "its true intent and meaning" are clear and definite; and privileges and immunities inconsistent with the provisions of the general law, are conferred upon State associations absolutely and without restrictions or qualifications in respect to any other class or kind of institutions.

Following the power or authority given as aforesaid and the forfeiture declared in case of any violation thereof knowingly, it is provided that (1) "in case a greater rate of interest has been paid, the person or persons paying the same or their legal representatives may recover back twice the amount of the interest thus paid from the associations taking or reserving the same; provided that such action is commenced within two years from the time the excess of interest is taken," (2) but the purchase, discount or sale of a bona fide bill of exchange, note or other evidence of debt payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for collecting the same, in addition to the interest, shall

not be considered as taking or receiving a greater rate of interest than seven per cent. per annum.

These two particulars are found in the thirtieth section of the act of Congress. They are new in some respects in the statutory laws of this State. Before the legislature passed this enactment, the borrower could maintain an action to recover the excess paid if his action was commenced within one year, and his right to recover terminated at the end of one year (1 R. S., § 3; Palen v. Johnson, 50 N. Y., 49).

The second particular being the same in respect to the purchase, discount or sale of a bona fide bill of exchange is a new permissive statutory provision, though it has been declared judicially that such purchase or discount was not usurious under the general statutes of the State in respect to usury (Lees' Bank v. Walbridge, 19 N. Y., 135).

This provision declared permissible just what the decisions had held was not prohibited.

Following the words given in the two particulars already quoted assimilating the privileges of the two classes of institutions, are found, in the second section of the State act, these words: "It is hereby declared that the true intent and meaning of this act is to place the banking associations organized and doing business as aforesaid, on an equality in the particulars in this act referred to with the national banks organized under the act of Congress entitled, &c."

In giving effect to these words of section 2, it must be borne in mind that it has been judicially determined by the highest court in this State, that the act of Congress limiting the forfeiture to the interest has reference to the banks organized under the act in those States and territories where no rate is fixed by law. In other words, that certain national banks are by the act of Congress authorized to charge seven per cent., and if they take or reserve more, the forfeiture is limited to

such excessive interest, or twice that amount if sued for within two years. Would it not be more reasonable to suppose the legislature (after conferring, as before shown, in express terms upon State institutions power to receive seven per cent. and providing that the forfeiture should be of the excessive interest in case of violation), intended to place State institutions in that respect "on an equality with the national banks organized under the act of Congress," that were by the act entitled to the same privilege and immunities as were expressly conferred by this act, than to suppose that by a declaration of the intent and meaning of the act the words of the first section were to be overthrown, so that no effect could be given to their express and clear scope?

There are no words in the second section restricting the words "the national banks organized under the act of Congress" to the national banks located in their places of business in this State.

A construction which should apply these words so as to refer to banks located in States and territories where there are laws upon the subject of usury would find no more support from the words of the act, than would the construction which should apply these words to those national banks in States and territories where no rate is fixed by law.

It having been declared in Bank v. Lamb, supra, that two classes are referred to in the national act, it may be fairly regarded as an open question in respect to which class reference is made in the second section of the act here under consideration.

A construction is always to be preferred which shall give full significance and effect to all the words of an enactment, over one which renders nugatory portions of the language employed (*Potter's Dwarris on Stat.*, 182 and note; Beals v. Hale, 4 How. U. S., 37).

"If the king's patent may be good to two intents then it shall be taken most beneficially to the king, but

if it may be to one intent good and to one intent void, then it should be taken to that intent which makes the grant good and not that which makes it void " (1 Coke, 45). The same rule applies to statutes (15 Johns., 358; 31 N. Y., 290; 8 Taunt., 13).

So too a proviso or saving clause which is repugnant to the body of the act is void (27 Penn. State, 303).

But suppose it be urged that the legislature assumed that all national banks had the privileges and immunities conferred by the first section of their enactment, in respect to State institutions, then may it not be replied with great force, that acting upon the assumption, a legislative construction was given to the act of Congress, and such construction adopted and incorporated in the legislative enactment and made applicable to the State associations?

Either view harmonizes the declaration in the second section with the antecedent language granting privileges to the State associations, and limiting the forfeiture to the interest in case of a violation of its permissive

language.

If the reference in the second section as to national banks is to that class in States where the rate of interest is regulated, it is difficult to find in the same section any words limiting the reference to those of that class located in this State any more than to those located in the State of Illinois, where the rate of interest is ten per cent, by law.

It is essential to refer the words "the national banks organized under the act of Congress" in the second section, to the class existing in States and territories, where the rate is not limited, in order to give effect to the words limiting the forfeiture to the interest, other-

wise they would be nugatory.

It was held in 24 *Pick.*, 370, that a construction of a statute which would lead to absurd consequences should be avoided.

The first section in clear terms declares that the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid (to wit: seven per cent.) shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon.

The forfeiture is declared in specific language as to the plaintiff, a State association, and the expression of one forfeiture is by its clear terms an exclusion of all others (Dudley v. Mayhew, 3 Comstock, 9; 50 N. Y., 49).

And as before shown, all acts inconsistent being repealed, so far as State associations are effected by them, and the repeal being absolute, quo ad such institutions, it follows that the plaintiff being a State association to which the act of 1870 applies, has upon the admitted facts forfeited the entire interest which the note in suit carries, and thirteen dollars and fifty cents agreed to be paid thereon in excess of seven per cent. per annum, and that the general provisions of the statutes of this State in respect to usury are repealed as to the plaintiff a State association.

Judgment ordered for the plaintiff.

CHASE against BASSETT.

Snpreme Court, Sixth District; At Circuit, February, 1874.

NEW TRIAL.—VERDICT AGAINST EVIDENCE.

The general rule applied in penal actions and in actions for defamation, that a verdict for defendant will not be set aside as against

evidence if the plaintiff has sustained only nominal damages, should be applied to actions for assault and battery, especially where the plaintiff was not wholly blameless, and has not been grossly injured or insulted.*

Stewart Chase sued Adams Bassett, in the supreme court, for assault and battery. Upon evidence, the substance of which is stated in the opinion, the jury at circuit, rendered a verdict for defendant.

The plaintiff now moved on the judge's minutes for a new trial, upon the ground that the verdict was against evidence.

John A. Scott, for plaintiff.

Bama Johnson, for defendant.

Balcom, J.—The general rule is that in penal actions and in actions of libel and slander, and in some other actions of tort where the plaintiff has not sustained more than nominal damages, and he seeks to recover punitory damages, a verdict for the defendant will not be set aside on the ground that it is against the evidence. But there are some exceptions to this general rule. No decision or elementary work has been cited to show that this general rule is applicable to an action for assault and battery. But I see no reason why it should not be adopted in such an action, unless the plaintiff is not blamable in the case, or has

^{*} Compare Stephens v. Wider, 32 N. Y., 351; Devendorf v. West, 42 Barb. 227; McIntyre v. N. Y. Central R. R. Co., 43 Id., 532; Brantingham v. Fay, 1 Johns. Cas., 255; Malin v. Brown, 3 Id., 566; Hyatt v. Wood, 3 Johns., 239; Fleming v. Gilbert, Id., 528; Hopkins v. Grinnell, 28 Barb., 533; Robbins v. Hudson River R. R. Co., 7 Bosw., 1; Comfort v. Thompson, 10 Johns., 101; Baker v. Richardson, 1 Cow., 77; Overseers of Rochester v. Lunt, 15 Wend., 565; Lawyer v. Smith, 1 Den., 207; Wheeler v. Calkins, 17 How. Pr., 451; Jarvis v. Hatheway, 3 Johns., 180; Hurton v. Hopkins, 9 Id., 36; Rundell v. Butler, 10 Wend., 119.

been considerably injured or grossly insulted by the assault and battery.

The plaintiff and others went into the defendant's saloon in the evening of July 24, 1873, where they drank strong beer; and the plaintiff was, when he went there and became while he was there, somewhat excited by liquor, and he danced some and made some noise in the saloon. The defendant requested him to desist and leave his, defendant's, saloon. The plaintiff's evidence was that before he had time to leave the saloon the defendant assaulted him and struck him three times on his arm and head, with a hard stick nearly as large as his wrist and about one foot and a half long. That one of the blows cut a hole through the skin on his head, which bled and injured him so much that he was obliged to employ a person a short time the next day to help him take care of a stage team he was driving as the servant of another. But the plaintiff did not lose any time out of his employment by reason of the assault and battery. The plaintiff's evidence as to the transaction in the saloon, and receiving a cut on his head with a stick of hard wood was partially corroborated by two other witnesses called by him. The plaintiff also proved that the defendant procured a friend to complain of him, and have him arrested and taken before a justice of the peace for the assault and battery in question, where the defendant pleaded guilty of such assault and battery, and was fined therefor five dollars by the justice; which the defendant paid.

The defendant testified that the plaintiff became noisy in his, defendant's, saloon, that he requested him to desist or leave the saloon, when the plaintiff made some threatening motions towards him with his fists—refused to leave the saloon—called defendant a son of a b—h and used other abusive or insulting language towards him. That he, defendant, struck

plaintiff once or twice with a stick which had been the butt end of a billiard cue—that the stick was ash timber—about an inch in diameter and from twelve to eighteen inches in length; that plaintiff resisted somewhat in being put out of the saloon; and that he, defendant, put him out. The defendant was corroborated in some of his evidence by a witness called by him.

The plaintiff admitted he called defendant a son of a b—h, but testified that he did so after the defendant had used some harsh or insulting or abusive words

towards him.

The foregoing is the substance or meaning of the evidence in the case. But my inference from the evidence is that the strong beer the plaintiff drank in the defendant's saloon considerably increased his intoxication; but he was not so much under the influence of liquor that he could not walk.

If the plaintiff had been much injured or had not used insulting or abusive language towards the defendant, I should not hesitate to set aside the verdict of the jury on the ground that it is against the evidence. But by reason of the small injury the plaintiff sustained and his partial intoxication when he went into defendant's saloon, and the noise he made and the insulting and abusive language he used towards the defendant in his saloon, and defendant's evidence as to threatening language of the plaintiff, and his raising and shaking his fists towards him, and defendant requesting him to stop his noise and leave the saloon before he struck him, I am of the opinion it is a proper exercise of my discretion to refuse to set aside the verdict of the jury in the action.

"Jaintiff's motion for a new trial is therefore denied.

Hayden v. Brooklyn Savings Bank.

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HAYDEN against THE BROOKLYN SAVINGS BANK.

City Court of Brooklyn; General Term, July, 1873.

PAYMENT.—CONSTRUCTIVE NOTICE.—SAVINGS BANK. -EVIDENCE OF DUE INQUIRY.

Payment by a savings bank to a person presenting a pass book is good, if the officers have no notice of fraud upon the depositor, and in making such payment exercise reasonable care and diligence.

Mary Ann Hayden, a married woman, in her life time, deposited money in the Brooklyn Savings Bank. After her death, her mother presented her pass book at the bank to the teller, who after putting some questions to her to test the identity of the depositor, which were readily answered, paid her the balance due on the account, believing that he was paying the individual who actually deposited the money. Patrick Havden, the husband of the deceased, was present at the time. He afterwards took out letters of administration on his wife's estate, and brought this action On the trial before a referee, it was shown that the by-law mentioned in the opinion of the court, was hung up in the banking room, and also printed on the cover of the pass book of each depositor. The referee gave judgment for the defendants, and the plaintiff appealed.

E. J. Maxwell, for appellant.

John P. Rolf, for respondent.

REYNOLDS, J.*-We think this case was properly disposed of by the referee.

^{*}Present, McCue, Ch. J., and REYNOLDS, J.

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The pass book which was issued to Mary Ann Hayden, the plaintiff's intestate, when she became a depositor with the bank, contained, among other by-laws and regulations of the defendants, the following: "The accountant will use his best efforts to prevent fraud, but all payments made to persons producing the deposit books, or duplicates thereof, shall be deemed good and valid payments to depositors respectively."

It was claimed on the argument that there is no proof

that any pass book was issued to her.

It could be hardly expected that the teller should have retained a positive recollection of the fact, but the book on which the final payment was made, was at all events issued by the bank, in her name, was found in her house after her death, containing entries of the payments which had been made to her on account, and was presented by her mother, in the presence of her husband, for payment.

These and other circumstances led inevitably to the conclusion that the book was delivered to her when she

became a dealer with the bank.

She then became legally chargeable with knowledge of the by-laws and regulations printed in the pass book, and hung up in the bank (Warhus v. Bowery Savings Bank, 5 Duer, 67, and 21 N. Y. 543; Eaves v. Peoples' Savings Bank, 27 Conn., 229; Sullivan v. Lewiston Institution for Savings, 56 Maine, 507.

The last case holds that while the officers of the bank are held to the exercise of reasonable care and diligence, yet in paying money upon the presentation of a deposit book, the disbursing officer is not required to demand strict proof of the identity of the depositor.

We think the regulation in question was a reasonable one, which the bank had a right, under its general powers, to make; and the case before us illustrates the necessity of affording these institutions the protection which such a rule is designed to secure.

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This depositor could not well be recollected among the thousands of customers dealing with the bank.

She died December, 1870, but no notice of her death was given to the bank, and three months after her death her mother presented the book, representing herself to be the depositor, or at the very least, she presented the book without explanation or notice of the death, and signed the initials of the depositor to the receipt for the money, the husband of deceased being present, and assenting to the payment; and after the bank had thus paid in good faith, the husband gets appointed administrator, and sues the bank to compel a second payment of the same amount.

If the rule will prevent the success of such a scheme, its operation is wholesome, at least in this case.

The evidence as to what diligence was exercised by the teller, at the time of payment, it is true, is not very definite or positive.

He does not seem to recollect what inquiries he did make, but evidently testifies rather from his usual way of transacting such business; but we have the fact of the presentation of the book; the presence of Patrick Hayden, and his assent to the payment—no circumstances of suspicion shown to have been apparent—the signing of the initials of the depositor, and a memorandum made by the teller at the time, showing that he examined or "tested" the validy of the claim.

On the whole, we think the evidence will sustain the finding of the referee that the teller made the payment after "due inquiry."

We come therefore to the conclusion that the judgment must be affirmed, without determining whether a proper demand was made before the commencement of this action.

HUBBELL against SCHREYER.

Court of Appeals; February, 1874.

Reversing 14 Abb. Pr. N. S., 284.

MECHANIC'S LIEN.—CONSTRUCTION OF THE STATUTE.— PARTIES.—NOTICE OF LIEN.

Where, after part of the work called for by a contract made by several joint contractors, has been finished and paid for, and the contract abandoned, if one of the joint contractors, by a new arrangement with the owner, goes on and completes the work, he may file a lien in his own name therefor; and the fact that he subsequently takes an assignment from the other original joint contractors, does not show that they were interested, and were necessary parties.

An ambiguity in the introduction of the notice, in describing the claim as being against one person, instead of as against two, may be cured by reference to a full and accurate statement of the claim in subsequent parts of the notice.

The mechanic's lien law is to be treated as a remedial statute; and though it is to be strictly construed so far as to require substantial compliance with every material provision by which the property of a third person may be incumbered by the mere act of the claimant, yet it is to be construed not so strictly as to deprive creditors of the benefit intended to be conferred.

A mistake in a notice filed under the act of 1863,—e. g., not naming all the debtors,—may be deemed cured by the provision of section 2, of the act, that no variance shall impair the claimant's right, but relief shall be given according to the evidence.

In a proceeding under that act, the court may give a personal judgment against the owner, if the debt was his proper debt.

Phllip C. Hubbell filed a notice of lien against the premises of John Schreyer, in the city of New York. The facts are fully stated in the opinion, and in our report of the decision here appealed from, in 14 Abb. Pr. N. S., 284.

E. J. Riss, for appellant.

D. McAdam, for respondent.

BY THE COURT.—ALLEN, J.—The appellant Muldoon seeks to establish and enforce a lien upon premises owned by the respondent Schreyer, in the city of New York, under the law known as the mechanics lien law (Laws of 1863, ch. 500). He had judgment upon the report of the referee for two thousand three hundred and sixty-five dollars and ninety-six cents. which was made up of two items, one of one thousand three hundred and forty-nine dollars, and the other for eight hundred and eighty three dollars, with the interest upon each. The court of common pleas of the city and county of New York, upon appeal, ordered a reversal of the judgment, unless the claimant would stipulate to reduce the recovery to the lesser item and the interest thereon; and he declining to stipulate, the judgment was reversed, and judgment given against him, and in favor of the owner, for the costs of the proceedings. The court below held the referee in error in respect to the larger claim, upon two grounds.

First. In rendering a personal judgment against the owner upon a claim stated in the notices to be against

the contractor; and,

Second. In holding that Muldoon acquired a valid lien upon claims due to him, jointly with two others, by filing a notice that the claim was due to him as the sole creditor. The first ground is not very material, as that, if stated, would only have led to a reversal of so much of the judgment as affected the owner personally, and his estate at large. The other ground was the one principally discussed by the learned first judge in his elaborate opinion. The facts pertinent to the present appeal may be very briefly stated.

In 1870, one Holt contracted with Schreyer, the

owner, to furnish material and do the mason work in erecting four buildings upon the lots described in these proceedings. Holt contracted with the appellant and two others, doing business as partners under the name of Muldoon, Kenny & Doonan, to furnish the brown stone, for the price of five thousand eight hundred dollars, payable three thousand dollars when the fronts were up, and two thousand eight hundred dollars when all the brown stone work was completed. When the fronts were up Holt was unable to pay the appellant and his associates, and they abandoned the work, and Kenny and Doonan absconded in September, 1870.

On October 24, 1870, the owner, Holt, the contractor, and the appellant, one of the sub-contractors, came to an arrangement, and Holt drew on Schreyer, in favor of the appellant, for two thousand seven hundred and fifty-five dollars, the balance of the five thousand eight hundred dollars, unpaid upon the contract with Muldoon, Kenny and Doonan, payable when the brown stone work should be completed, and the same was accepted on the same day by the owner, the present respondent. Muldoon then resumed and completed the contract before January 12, 1871, the day on which the notice of lien was filed, and the owner had then paid upon the order or draft one thousand four hundred and fifty-two dollars, leaving one thousand three hundred and forty-nine dollars due thereon. Muldoon had also at that time furnished materials and done work outside of the contract, at the request of the owner, to the amount of eight hundred and eighty-three dollars, and these two sums made up the amount adjudged the claimant Muldoon by the referee. The notice, which was held by the common pleas, defective and fatally variant from the facts established upon the trial, after stating with precision the residence of the claimant, proceeded to state that he had a claim against Thomas Holt, amounting to one thousand three hundred and

forty-nine dollars, and against John Schreyer, amounting to eight hundred and eighty-three dollars, and amounting together to two thousand two hundred and thirty-two dollars due to him, and after stating for what work and materials the claim was made, stated "that such brown stone was furnished, cut, and set in pursuance of agreements, written and by parol, between the said Thomas Holt and the said John Schreyer, and me the said Francis Muldoon" which buildings are owned, &c., naming the owner and describing the premises.

The new arrangement, under which the appellant continued and completed the work which Muldoon, Kenny and Doonan had undertaken by their contract to perform, was made in October, after the work had been abandoned by the contractors, and after the whole amount then payable had been paid. The draft then made and accepted, was but for two thousand seven hundred and fifty-three dollars, instead of two thousand eight hundred dollars, showing that the three thousand dollars, payable when the fronts of the buildings were up, had been slightly overpaid. The appellant then, by an agreement between himself and Holt, the contractor, and Schreyer, the owner, assumed individually the completion of the contract, Holt authorizing, and Schreyer undertaking to make the payment to Muldoon when the work should be completed. For the work done and the money earned under this new arrangement, Kenny and Doonan had no claim, and they were not parties to the agreement, and did not contribute to the work, and the undertaking of Holt and Schrever to pay Muldoon, was absolute. The subsequent assignment by Kenny and Doonan to the plaintiff, is only important as showing that they made no claim to, and had no interest in the money now claimed by Muldoon.

The notice filed by Muldoon described the claim

with substantial accuracy. It was described in the introduction as a claim against Holt, and this was in one sense true, as, but for the acceptance of the draft by Schreyer, he would have been the principal, as he was the immediate, debtor to the claimant. But the subsequent parts of the notice relieve this statement from all uncertainty and ambiguity, by declaring that the claim, that is the aggregate of the claim, composed in part of this claim alleged to be against Holt, was for brown stone furnished, cut and set in pursuance of agreements, written and by parol, between Holt, Schreyer and the claimant.

This was literally true, and neither the owner nor any one else could have been misled as to the particular claim intended to be asserted, and in respect to which a lien was sought to be created. The new formal claim, filed in the proceedings in the court of common pleas, gave more in detail the history of the contracts and transactions between the parties, but did not more clearly or distinctly describe or designate the claim or the right of the claimant.

The statute under which these proceedings are had is a remedial statute, as furnishing a summary remedy for the recovery of the claims provided for, and while it is to be strictly construed so far as to require a substantial compliance with every material provision by which the property of a third person may be incumbered, and a cloud put upon the title, by the mere act of the claimant, it is not to be so strictly and hypercritically interpreted as to deprive creditors of the benefit intended to be conferred.

It is to be construed in the same spirit with which it was enacted, and so as to carry out the benign intent of the legislature, while nothing is to be taken by implication against the owner, or to the prejudice of his substantial rights, or so as to extend to persons or claims not clearly within its terms. The framers of

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the statute have in a measure indicated the spirit with which they would have the statute interpreted, and effect given to it.

The first section declares that persons performing labor, or furnishing materials, as specified, may, on complying with the sixth section of the act, have a lien, &c. The second section declares that all persons having liens, in order to enforce the same, shall prove their demands in the same manner as in ordinary actions at law, except that no variance as to the persons named as contractor, owner or debtor, in the lien, notice, or bill of particulars, or statement of claim, or in any pleading, shall impair or affect the right of the claimants, and that every party shall have relief according to the rights of the parties as they shall appear in evidence.

The fifth section is still more explicit, and directs that the court shall proceed without regard to matters of form, which shall be amendable at all times while the proceedings progress, without costs, and judgment shall be rendered according to the equity and justice of the claims of the respective parties. The sixth section prescribes the form of the notice, the filing of which creates the lien. It must state the residence of the claimant, the amount claimed, from whom, and to whom due, &c. The claim before us states the residence of the claimant, the amount due, and both with accuracy. It also states to whom due, accurately, regarding the appellant, as we must, under the circumstances, as completing the work under the arrangement of October,and with substantial accuracy, if the work was completed under the contract of Muldoon, Kenny and Doonan, the appellant completing it after an abandonment by the others, and with the assent of the contractor and owner, and their several engagement to pay him for the same. If there was any mistake in naming the debtor, which was not clearly explained by other

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parts of the notice, it was cured by the second section of the act, and did not affect the rights of the claimant.

The appellant filed his notice, and perfected his lien on January 12, 1871, and it is not claimed that at that time the owner, the present respondent, had paid Holt, the contractor, the full amount due him. The referee finds that he had done so on March 16, or thereafter, but he probably included the liability as acceptor of the draft, as a part of the payment.

Under the circumstances of this case, if the owner has paid the contractor after the acceptance of the order of October, he has done so in his own wrong, and is still liable to the appellant. He admitted on the trial the amount due in the order, and made no claim that

he had paid that amount to the contractor.

The personal judgment was proper, for the reason that the debt was the proper debt of the owner, as well as of the contractor, and the work was done, and materials furnished upon the credit of both.

No other questions were made upon the argument in the view taken of the evidence, and the act under which the lien is claimed.

The judgment of the common pleas must be reversed, and the judgment on report of the referee affirmed.

All the judges concurred, except Folger, J., not voting.

ANONYMOUS.

[No. 2 of this Title.]

Supreme Court, First District; Special Term, Janu ary, 1874.

DIVORCE.—ALIMONY.—PARTIES.

A woman who intervenes in an action of divorce, on the ground of having contracted a marriage with the husband who is a party to the action, the validity of which marriage might be affected by a judgment in the action, may be allowed alimony and counsel fee therein.

After a judgment which dismisses her in effect from the action, she is no longer entitled to alimony; but the court may still allow her a counsel fee to enable her to litigate the case on appeal.

The action was brought by a husband against his second wife for a divorce. He obtained judgment by the wife's default to interpose a defense, and he married again. Subsequently dissensions arose between him and this third wife; and the second wife, from whom he had been divorced, applied to the court to open the judgment on the ground of fraud.

The judgment was opened, and a trial ordered, whereupon the third wife applied for leave to intervene as a party to enable her to protect her right. The facts are more fully stated in a report of the decision of the case at page 171 of this volume.

She also applied for alimony and counsel fee, and one hundred dollars per week was ordered to be paid for her support. Counsel fees were also allowed.

On the entry of the judgment above referred to, the plaintiff ceased to pay alimony.

While the appeal was pending before the general

term, the third wife applied to the court for an order to compel plaintiff to pay up the alimony under the previous order, or if that was denied, for a new allowance and for counsel fees. It was conceded on the argument, that the old order for alimony ceased with the judgment. The motion was therefore argued for a new allowance and for counsel fees.

In the mean time the general term had heard and decided the appeal from the decree.

T. C. T. Buckley, for plaintiff.

John L. Hill, for the third wife, the applicant.

DAVIS, J., (orally).—I may as well dispose of the questions involved in this motion now while they are fresh in my mind, from the argument, and the consideration which I have given them, with my brethren of the general term.

The whole subject of alimony is regulated by statute. The court is authorized in every suit brought for

divorce, or separation, to require the husband to pay a suitable sum to enable the wife to carry on the suit. No distinction is made between a suit for divorce upon the ground of nullity of the marriage, or for any other cause; all are denominated divorces, or separations.

In the early part of the present case, Mrs. P. was permitted to appear as a party for the protection of her rights. This was perfectly proper, because the proceeding was one in which she was deeply interested. The plaintiff had succeeded in obtaining a decree releasing him from his second wife, on the ground of a prior marriage; the third wife, whether properly or not, had married and had children by him, relying doubtless, to some extent, upon this decree. It was then alleged by the same wife, that this decree was a fraud upon her, as well as upon the court, and she there-

upon applied to have it vacated, and to have her marriage restored.

Of course the third wife was vitally interested in this proceeding. Justice and equity required that she should have notice of the proceedings, and be permitted in some way to participate for the protection of her rights. She therefore petitioned to be made a party in form, and was with obvious propriety permitted the rights of a party for this purpose alone. Being in this sense a party, she was entitled to prosecute her suit to this extent, and to an allowance for her support, and for her expenses to protect and enforce her rights, so long as the necessity for her appearance continued. Both alimony and counsel fee were ordered, as it appears. It was quite immaterial that she was neither plaintiff or defendant at the commencement of the suit, but came into court voluntarily afterwards. There was obvious propriety in her participating in a proceeding, the object of which was to affect, or which might affect her marriage. The action was for a divorce; that was all that was necessary under the statute, after she became an actual party, to give her the right to both alimony and counsel fee, irrespective of the question of the legality of the marriage, which it was conceded had been in fact entered into between the parties. This tripartite proceeding was thus prosecuted to judgment. The object of her presence in the suit had been accomplished. So far as she was affected by the suit, she was protected by the judgment. She was therefore dismissed as a party.

But Mr. P. was not satisfied with this; he insisted that she was a party as to whom he was entitled to a final judgment. He was therefore seeking to have her made a party, and to obtain a decree against her as such. We have just examined that question at the general term, and concluded that she was only allowed to interfere for a special object, and there having been no sup-

plemental pleading on the part of the plaintiff to create an issue as to her, there was no issue upon which the court could pronounce a judgment of divorce as to her, even under the present system of practice. The result is that she is not now a party, and certainly has not been a party since the final judgment. She cannot therefore be entitled to alimony as such party. But the question of counsel fees is by no means controlled by this conclusion as to alimony. As I have said, the plaintiff is now struggling to make her a party, and she is resisting his efforts. In this effort, she is plainly entitled to have the services of counsel, and it is obviously proper that the plaintiff, who has placed himself in the relation of husband to her, in fact should pay for the service which his act has made necessary. It is a part of the burden and expense which the law casts upon him. He seeks to show that this lady is not his wife. We have held that whatever he may obtain in this respect will be matter of strict law.

Having assumed the obligations of a husband he ought to be held to the rule imposing the burdens of a husband, at least until he establishes the fact that he is not. If she was still a party to the present suit, she would be entitled to both alimony and counsel fee.

I shall therefore deny the application, so far as relates to alimony, but order the plaintiff to pay a suitable counsel fee, for the argument and attention to the cause on the appeal. Counsel may agree upon the amount if they can, otherwise I will fix it. *

^{*}Counsel said that they preferred to have his honor fix the amount. The court then fixed the amount of counsel fee at five hundred dollars, and an order was entered to that effect.

ANONYMOUS.

[No. 3 of this Title.]

Supreme Court, Third Department; General Term, 1873.

DIVORCE.—PLEADING.—MATERIAL ALLEGATIONS.

In a husband's action for divorce, on the ground that he had a former wife, who was still living at the time he married defendant, and at the time of the commencement of the action,—an allegation in the answer, that plaintiff had, before marrying defendant, procured a decree of court adjudging him at liberty to marry, and that defendant had thereupon in good faith married him, being induced by his fraud to believe that he was at liberty to marry,—is immaterial.

An allegation in the answer, that defendant has no knowledge or information sufficient to form a belief as to whether the first wife was living at the commencement of the action, is a denial of a material allegation.

An allegation in the complaint; charging defendant with a knowledge of the prior marriage at the time of her marriage with plaintiff, is material upon the question of costs, and perhaps on that of the legitimacy of the children, and of alimony; and since an omission to deny it would admit it, it may properly be denied in the answer.

The plaintiff in the action last reported, brought another action against his third wife, Constance, for a divorce from her on the same ground as those he relied on formerly in his action of divorce against his second wife, Caroline, which is above reported.

The allegation of the complaint were as follows:

The above named plaintiff avers, that on or about April 23, 1839, in the parish of Handsworth, in the county of of Stafford in England, plaintiff and one Susannah B—— were duly and legally married, and lived together as husband and wife for a period of

about one year, when plaintiff left England, and came to the United States of America, and has ever since been an inhabitant thereof. Said Susannah remained in England, and, at the time of the marriage between defendant and plaintiff, hereinafter mentioned, was living, and plaintiff avers, on information and belief, that she is still living, and said marriage between said Susannah and plaintiff remained and was in full force and effect at the time of said marriage between defendant and plaintiff as hereinafter stated.

On or about the first day of July, in the year 1865, plaintiff and defendant were married in the city, county, and State of New York, and lived together as husband and wife until the month of July, in the year 1871, and had issue of said marriage, to wit: L— M—, who is now between five and six years of age, and N—, who is now between two and three years of age, and both of whom still survive. Plaintiff further avers, that at the time of said marriage between plaintiff and defendant, both defendant and plaintiff were, ever since have been, and still are, inhabitants of the State of New York.

Plaintiff further avers, that at the time of the last mentioned marriage, plaintiff had not seen said Susannah, nor heard from her for a long time, and supposed she was deceased; but since said marriage between plaintiff and defendant, it has been ascertained, proved and established, in certain judicial proceedings to which plaintiff and defendant were parties, that said Susannah was living at the time of said marriage between this plaintiff and defendant, and since it has been so ascertained, plaintiff and defendant have not lived together. Plaintiff further avers, that before and at the time of said marriage with defendant, she was informed and knew of said prior marriage between plaintiff and said Susannah.

Plaintiff is desirous of having said marriage between

defendant and plaintiff dissolved and declared void, and hereby applies for and demands judgment that the said marriage between plaintiff and defendant be dissolved and declared void, according to the statute in such case made and provided, and that said L—— and N——, be declared legitimate, and entitled to succeed to personal and real estate the same as though born in lawful wedlock; and also that plaintiff may have such further other and different relief in the premises as shall be equitable, and the circumstances of the case require.

The defendant (the third wife) answered the complaint as follows:

First. She admits that in the year 1839, in the parish of Handsworth, in the county of Stafford, in England, in the kingdom of Great Britain, the plaintiff and one Susanna B——, were duly married, and lived together as husband and wife at Birmingham for a period of about one year, when the plaintiff abandoned his said wife, left England, and has never since been an inhabitant thereof.

Second. She avers that that the said Susannah continued to reside at Birmingham, aforesaid, until the year 1843.

That in the month of May, in that year, a certain agreement in writing was duly entered into by and between the plaintiff and his said wife, and one S—G—, by the terms and conditions of which agreement it was stipulated that the plaintiff and his said wife should thenceforth live separate and apart from each other, to all intents and purposes as though they were sole and unmarried, each without hindrance, interferance, or molestation by or from the other, and by which it was further agreed on the part of said S—G— that he should indemnify the said plaintiff against certain acts of the said Susannah.

Third. That shortly after the execution and delivery

Fourth. This defendant has no knowledge or information sufficient to form a belief as to whether the said Susannah was living at the commencement of this action.

Fifth. That in the month of October, in the year 1843, the above named plaintiff intermarried with one Caroline —, in the city of Brooklyn, county of Kings, New York, and thereafter, and until on or about the year 1863, a period of twenty years, the plaintiff and the said Caroline cohabited together as husband and wife.

Sixth. That in the month of November, in said last named year, 1863, the said plaintiff commenced an action of divorce against his said wife Caroline, in this court, and such proceedings were had in said action that, on the seventh day of March, 1864, a judgment was rendered by this court, and on said day was duly entered in said action, by the terms of which judgment the said marriage contracted by and between the plaintiff and the said Caroline, on October 21, 1843, was adjudged and decreed to be null and void, and was thereby dissolved, and by which it was further adjudged and decreed that each of the parties to said action, to wit, the said-plaintiff and the said Caroline, were, and should be henceforth at liberty to marry again, as though said marriage between them had never been

had. That a copy of said judgment is hereto annexed, marked schedule A, and forms a part of this answer.

Seventh. That thereafter the plaintiff proposed to this defendant to contract marriage with her, and in order to induce her to consent thereto, and to convince her of his right to contract such proposed marriage on his part, the said plaintiff exhibited to this defendant the said judgment of this court, and read to her such portion thereof as adjudged and decreed the dissolution of the plaintiff's former marriage, and granted liberty to the plaintiff to marry again, as though such former marriage so dissolved had never been had, and the plaintiff then and there, and frequently thereafter, represented to this defendant that he had the legal right

under such judgment to marry this defendant.

That this defendant consulted her friends and relations, as well as legal counsel, as to such proposal of the plaintiff, and as to the right of the plaintiff to contract lawful marriage with her under the terms of said judgment and decree of this court, and this defendant being so advised by counsel, and relying upon said judgment and the representations of plaintiff, was induced to believe, and did believe, that the said plaintiff had legal right to contract marriage with her, and trusting to and relying upon the permission given by this court in and by said judgment and decree, and the representation of the plaintiff, the defendant consented to contract marriage with the plaintiff, and accordingly on or about the first day of July, 1865, the plaintiff and the defendant were married, as alleged in the complaint, and from that day until on or about the month of October, 1871, they cohabited together as husband and wife, when in the month last mentioned the plain. tiff expelled the defendant from his house.

Eighth. The defendant denies that before and at the time of her said marriage with the plaintiff, she was informed, or knew, or had reason to believe of the

former marriage between plaintiff and his first wife, the said Susannah B—, or the grounds upon which said judgment of divorce was founded.

Ninth. The defendant further alleges that her said marriage with the plaintiff was contracted in good faith, and without any knowledge or information or suspicion of any legal impediment thereto, and in implicit confidence and reliance upon the permission granted by the judgment aforesaid and upon the representations of the plaintiff.

Wherefore the defendant demands judgment that the complaint be dismissed, or that in case such marriage should be dissolved, that suitable provision be made by the judgment of this court for her support and maintenance, and the support, maintenance and education of her children by the plaintiff, and to that end she humbly submits her rights in the premises to the judgment of the court.

The court at special term, upon motion, struck out all the second subdivision of said answer after the figures "1843" in the third line thereof; and all of the third subdivision down to the word "unknown," in the eighth thereof; and all the fourth, fifth, sixth, seventh, and eighth subdivisions of the answer. The defendant appealed from the order.

John L. Hill, for appellant.

Stephen Brown, for respondent.

BY THE COURT.*—PLATT POTTER, J.—There can be no question that most, if not all of the matters stricken out of the defendant's answer were immaterial in an action by the plaintiff for divorce based upon the provision of the statute, that the plaintiff had another and a former wife living at the time of his marriage to the

defendant; and though such marriages are void (2 Rev. Stat., 139, § 5, subd. 2), yet it would seem that the party who has knowingly entered into such second marriage cannot relieve himself from his civil liabilities under such second marriage until legally relieved by a decree of the court upon application made therefor (2 Rev. Stat., 142, § 22; 1 Id. 5 ed., vol. 3, p. 233, § 33).

The complaint, it will be seen, avers a marriage between plaintiff and one Susannah B-, in England, in 1839; that he (plaintiff) left her in England about one year thereafter; and in July, 1865, married the defendant in the city of New York; that he continued to live with her from then until July, 1871, and had issue by her, two children, who now survive. These are all the material facts necessary for the plaintiff to prove, except also, that his first wife is still living, and that the said marriage with her remained in full force at the time of his marriage with the defendant, and also, for certain purposes, that she was living at the commencement of the action (2 Rev. Stat., 142, § 22). It is the fair construction of the complaint, that the plaintiff absented himself from his former wife, from the year 1840, until his marriage with the defendant, but there is no written allegation, nor inference, that she absented herself from him. Proper matters for defense in such an action, are, that the former wife was not living at the time of the marriage to the defendant; that she was not living at the time of the commencement of the action, and also, all matters relating to the question of the legitimizing of the children; and questions affecting the costs of the action, and perhaps, also the question of alimony, are proper to be set up in the answer.

In this view, I think the matter set up in the fourth subdivision of the answer, and stricken out, "that the defendant has no knowledge or information sufficient to form a belief whether the said Susannah was living

at the commencement of this action," was a material allegation in order to join issue upon the statement in the plaintiff's complaint, that she is still living. This allegation should not have been stricken out.

So, too, I think, that so much of the eighth subdivision of the defendant's answer stricken out, as is in the following words: "The defendant denies that before and at the time of the said marriage with the plaintiff, she was informed, or knew, or had reason to believe of the former marriage between the plaintiff and his first wife, the said Susannah B-," was material as an answer to the allegation in the complaint, that before and at the time of said marriage with defendant, she was informed and knew of said first marriage between plaintiff and said Susannah." Though the fact of knowledge might not be a perfect defense, the omission to deny the charge would be an omission of a fact very material upon the question of costs, and perhaps of the legitimacy of the children and of alimony. If it was material to charge this knowledge upon the defendant, it was equally material for her to deny it if not true. It does not well become the plaintiff to object to her denial of a fact which he relies upon as sufficiently material against her to charge in the complaint. The other matters struck out at special term, do not seem to be material to the issues to be tried.

The order of the special term should be modified, as above suggested, without costs to either party on the appeal.

MULLANEY against SPENCE.

City Court of Brooklyn; General Term, January, 1874.

NEGLIGENCE.—CAUSE OF ACTION.—TRESPASSER.—IN-FANT.—NONSUIT.

The fact that a person, injured by a dangerous machine negligently left unguarded, was technically a trespasser, when injured, does not necessarily preclude the recovery of damages.

Defendant had, in his coal yard, an elevator worked by steam, close to the line of the sidewalk; and during the intermission of work, the sliding door by which it was commonly shut off from the street, was left open; and in the absence of any person to guard it, a child, who approached it, was caught and crushed by the descending car. Held, in the administrator's action to recover damages, that it was improper to grant a nonsuit on these facts; and that the question of the defendant's negligence should be submitted to the jury.

It is negligence to leave a dangerous machine in motion, unguarded, in such an exposure, that children playing near might be expected to be drawn to it by curiosity, and injured.

The parents of the child in this case lived in a quiet neighborhood in the city, where few vehicles passed, and the mother permitted the child to play upon her steps with other boys, watching him meanwhile as her work permitted. *Held*, that the question of her negligence, in not keeping him away from the machine, should have been submitted to the jury.

This action was brought by Michael Mullaney, administrator, against William Spence, to recover five thousand dollars damages for the death of the plaintiff's child, four years and six months old, caused under circumstances which fully appear in the opinion.

The case now came before the court on appeal from a judgment of nonsuit, and from an order denying a motion, made upon the judge's minutes, for a new trial.

Henderson Benedict, for plaintiff, appellant.—That plaintiff might recover if the child and its mother were not guilty of negligence, even though it was technically a trespasser cited, besides the cases in the opinion (Coupland v. Hardigham, 3 Campb., 398; Chapman v. Parlane, 3 Scotch Session Cases [1 ser.], 401; 3 S. & D. R., 585; Temperance Hall Ass. v. Giles, 33 N. J. L. [4 Vr.] 260; Davis v. Hill, 41 N. H., 329; Algier v. Lowell, 3 Allen [Mass.], 402; Shearman and R. on Negligence, p. 411, § 359; p. 568, § 505; p. 641, § 590; p. 570, § 508; p. 38; Daly v. Norwich R, 26 Conn., 591; Brown v. Lyn, 31 Penn. St., 510; Townsend v. Walker, 9 East, 277; Loomis v. Terry, 17 Wend., 497; Norris v. Litchfield, 35 N. H., 271; Conklin v. Phenix Mills, 62 Barb., 299; Firmstone v. Wheeley, 2 D. & L., 208; see Deane v. Clayton, 7 Taunt., 489).

II. The deceased had not attained that age when a person is considered in law sui juris, or responsible for their own conduct. He cannot be charged with contributory negligence to defeat an action against one who negligently injured him. He can only be held to that degree of care to be reasonably expected from one of his age. If his custodian was negligent, he is responsible for it. If his custodian took proper care, he has the benefit of it (Mangam v. Brooklyn R., 38 N. Y., 460; Ihl v. 42d St. R., 47 N. Y., 323; Bellfontaine R. R. Co. v. Snyder, 18 Ohio St., 399; Schmidt v. Milwaukie R., 23 Wis, 186).

III. The mother of deceased took proper care of him. She had her eye off of him only ten minutes. In no reported case where there has been evidence the custodian took any care at all to keep the child out of the street, has the court ever taken a case away from the jury, and said as matter of law, the custodian was negligent. In Hartfield v. Roper, 21 Wend., 615; and Lehman v. City of Brooklyn, 29 Barb., there is no evidence the parents took the slightest care to keep the

children out of the street. In most all of these cases the children were voluntarily permitted to run in the street. But where there has been evidence the street was not very dangerous, not a great many vehicles passing (as in Cosgrove v. Ogden, 49 N. Y., 255; Karr v. Parks, 40 Cal., 188; Abb. U. S. Dig. (1872) 483), or where the parent allowed the child to go into the street, even though a dangerous street, with an attendance, though the attendance was only a child nine years old (Ihl v. 42d Street R. R. Co., 47 N. Y., 323), the court have held it a proper case for the jury, and not negligence per se (See also Keller v. N. Y. Central, 2 Abb. Ct. App. Dec., 480; Jetter v. N. Y. & Harlem R. Co., Id., 458; Schmidt v. Milwaukie R. 23 Wis., 186; 1871, Westchester R. v. McElivee, 67 Pa. St. 311).

IV. Defendant's negligence being gross, he is liable even if the mother of the deceased was negligent in taking care of him (Hartfield v. Roper, 21 Wend.; Mangam v. Brooklyn R., supra; King v. Wells, 1 E. D. Smith, 74; Carter v. Towne, 98 Mass., 568; Grill v. Gen. Iron Co., Law Rep. 1 Com. Pl., 600; affirmed exchequer chamber, 3 Id., 476; O'Flaherty v. Union R., 45 Mo., 70).

V. There is no evidence that deceased was guilty of contributory negligence. No one witnessed the accident; contributory negligence will not be presumed. A plaintiff is not bound to show he was free from negligence until defendant has proved he was guilty of negligence. If deceased exercised proper care (and it is to be presumed he did till contrary is shown); defendant is liable for any negligent injury to him, without regard to the question, whether his custodian was negligent or not (Ihl v. 42d St. R., 47 N. Y., 223; McMahon v. Mayor, 33 N. Y., 647; Shearm. on Neg., p. 52; O' Mara v. Hudson R. R. R. Co., 38 N. Y., 445; Costello v. Syracuse Railroad, 65 Barb., 99; Johnson v. Hudson Railroad, 20 N. Y., 65).

S. D. Morris and S. E. Pearsall,—Insisted that the only question at the trial was one of law for the court (Ernst v. H. R. R. Co., 24 How. Pr., 107; S. & R. Neg., § 11; Pitts. & Con. R. R. Co. v. McClurg, 56 Penn., 294; 2 P. F. Smith, 282; 11 Casey, 71; 9 Id., 318; Dascom v. Buffalo & State Line R. R. Co., 27 Barb., 222; Hartfield v. Roper, 21 Wend., 615; Spencer v. Utica & Schenectady R. R. Co., 5 Barb., 337; 6 Hill, 592; 5 Id., 282; 19 Wend., 399; Sheffield v. Rochester & Syracuse R. R. Co., 21 Barb., 339; Haring v. New York & Erie R. R. Co., 13 Id., 9; Pierce on Am. R. R. Law, 272, et seq).

BY THE COURT.—REYNOLDS, J.—Two questions arise in this case. First. Was the defendant guilty of any negligence contributing to the injury? The defendant is the proprietor of a coal-yard in Baltic-street, in the city of Brooklyn. In his yard he makes use of an elevator for the purpose of receiving coal from carts on the sidewalk, and distributing it through the yard. The elevator is worked by steam, and stands, according to plaintiff's evidence, eight inches from the line of the sidewalk. When not in use it is commonly shut off from the street by a sort of sliding door, but at the time of the injury to deceased this door had been left open during an intermission of the work, and while the defendant, who himself acted as engineer, was absent, leaving the fireman in charge of the place. For some reason, which does not appear, the elevator was in motion, and while it was coming down slowly, and, as the witnesses say, without any perceptible noise, the deceased child was caught by the descending car and crushed. It is very likely that the deceased, drawn by the curiosity of a child, was looking at the engine, which stood a few feet inside, and was just visible from the open doorway. The fireman was back by the engine, and there was no guard or other means of

protection or warning against the danger to be apprehended from the operation of the machinery.

Do these facts present sufficient evidence of negligence on the part of defendant to warrant the submission of the question to the jury?

There is a numerous class of cases holding that the owner of land adjoining a highway is bound to use care in maintaining his own premises in such a condition that persons lawfully using the highway may do so with safety. If a person, for instance, makes an excavation so near the highway that one lawfully using the way and using ordinary caution might accidentally slip and fall into it, he will be liable for a nuisance to the highway (see Barnes v. Ward, 9 C. B., 392; Hadley v. Taylor, L. R., 1 Com. Pleas, 53.

The case of Vale v. Bliss, 50 Barb., 358, was determined upon this principle, and it was there applied in behalf of a man, who, meeting some obstruction at night on the sidewalk, instead of taking the carriage way, turned in upon the premises of defendant, several feet from the line of the sidewalk, and fell into an area in front of a building in course of erection.

These and the like are cases, however, where persons have been injured while in the ordinary use of the highway for purpose of travel; while it is claimed by defendant, and seems quite probable, that the deceased deviated from the sidewalk for the purpose of looking into defendant's yard.

There is another class of cases, however, invoked by plaintiff's counsel, which seems to involve a further principle, applicable, as I think, to the case before us. It will suffice to refer to a few of these. Lynch v. Nurdin, 1 Ad. & E. N. S. 29; S. C., 41 Eng. Com. L., 342; 2 M. & W., 248, has often been cited with approval. Defendant's servant left his horse and cart unattended in the street. Plaintiff, a child seven years old, got upon the cart in play. Another child incautiously led

the horse on, and plaintiff was thrown down and hurt. It was held that the defendant was liable in an action on the case, though the plaintiff was a trespasser, and contributed to the mischief by his own act, and that it was properly left to the jury whether the defendant's conduct was negligent, and the negligence caused the injury. Lord Denman, delivering the opinion of the court, said, in substance, that no greater degree of care was to be required than was compatible with his age and capacity, and that if, in getting on the cart, he merely indulged the natural instinct of a child in amusing himself with the empty cart, the defendant could not avail himself of that fact.

Birge v. Gardiner, 19 Conn., 506, was decided by a court of great weight and authority. The defendant had set up a gate on his own land, by the side of a lane through which the plaintiff, a child between six and seven years of age, with other children, was accustomed to pass between his residence and the highway. In passing along the lane he put his hand on the gate and shook it, causing it to fall on him and break his leg. The plaintiff recovered a verdict, which was sustained by the supreme court.

Church, Ch. J., says: "The plaintiff was a child, without judgment or discretion, and it was submitted to the jury to say whether such a child ought to be chargeable with fault, so as to defeat his recovery, or whether or not the acts done by him were not rather the result of childish instinct, which the defendant might easily have foreseen. It might perhaps have been going too far for the court to have said, as a matter of law, that a child of this age could not be so blameworthy as to excuse the defendant. We will not say that such cases may not be imagined, or may not sometimes occur.

"But it was favorable to the defendant, and he cannot complain of it, that the age and condition of the plain-

tiff, connected with the circumstances of the case, were put to the jury, for them to determine what degree of fault, if any, was imputable to the plaintiff. It cannot be claimed that the law would require the same acts of caution and prudence in a child as in a man."

In Whirley v. Whiteman (1 Head [Tenn.], 610), it appeared that the defendant owned a paper mill in Nashville, the machinery of which was propelled by steam. There was a shaft proceeding from the engine house and extending through the wall of the mill house. On the end of this shaft, some eight or ten inches outside the wall, was fixed a cog wheel, which was geared into another cog wheel. The wheels revolved from ten to twenty inches from the ground. They were about twenty feet from the street, in an open space, entirely exposed, without any cover, guard or enclosure. Plaintiff was about three years old, and his mother lived on the other side of the street, nearly opposite the mill. The wheels were generally in motion. Plaintiff and other children were in the habit of playing about the mill. One day when the engineer and other hands were absent at dinner, leaving the wheels running, the plaintiff was caught by them and injured. The wheels might have been easily boxed, or an enclosure made around them, so as to have avoided the danger of injury to any one. The jury found for defendant, and the verdict was set aside as contrary to the evidence. The court say: "We feel clear, upon the facts proved in this record, that the defendants were guilty of negligence, perhaps, it might be said, gross negligence, in leaving machinery so exposed, as that by possibility, it might be the cause of injury to others. . . . In playing about the cog wheels, the plaintiff was but indulging the natural instinct of a child, but yielding to the temptation into which he was led by the negligence of the defendant." After noticing the above cases and others, the court say: "These cases rest upon the

principle, that the law imposes restrictions upon every one, as well in the use and enjoyment of his property, as in his personal actions and conduct, and that though a man do a lawful thing, yet, if any damage thereby befall another, he should be answerable if he might have avoided it " (See *Brooms' Legal Maxims*, 248).

I shall notice but one case further on this point. The Sioux City & Pacific R. R. Co., plaintiff in error, v. Stout, lately decided in the U. S. supreme court, 17 Wall., 657, was an action to recover damages for an injury sustained upon a turn-table belonging to the defendant (plaintiff in error). We have been furnished with a copy of the opinion of the court, delivered by Mr. Justice Hunt, which shows that the plaintiff was six years of age, living with his parents. The turn-table was in an open space, about eighty rods from the depot, on the defendants' own land, near two traveled roads, with a few houses in the neighborhood. Plaintiff, without the knowledge of his parents, went with two other boys to the depot, and when they arrived, it was proposed by some of them to go to the turn-table to play. It was not attended or guarded by any employee of the company, and was not fastened or locked. and revolved easily on its axis. Two of the boys attempted to turn it, and the plaintiff's foot was caught. and crushed. The plaintiff recovered a verdict, the judgment upon which was affirmed by the supreme court. The judge below had charged the jury, that to maintain the action, it must appear by the evidence that the turn-table, in the condition, situation, and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that they were further to consider, whether, situated as was the defendant's property in a small town, remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded.

This charge was approved. The court say: "If, from the evidence given, it might justly be inferred by the jury, that the defendant, in the construction, location, management or condition of its machine, had omitted that care and attention to prevent the occurrence of accidents, which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff."

This and some of the preceding cases will dispose of any objection arising from the fact that the deceased may have been technically a trespasser. Judge Hunt says: "We conceive the rule to be this, that while a railroad company is not bound to the same degree of care in regard to mere strangers, who are unlawfully upon its premises, that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injury arising from its negligence, or from its tortious acts." Upon authority and principle, it seems to me it might well have been left to the jury whether this elevator, so situated, was not a dangerous machine, when left unguarded and in motion, and whether the defendant should not have anticipated just such a casualty as did occur unless some precaution was made use of to insure safety.

It is said the sidewalk at this place was rough and unfinished. It was nevertheless a highway, and perhaps quite as likely to be frequented by children, as if it had been flagged. It would have been quite easy, when no coal was being delivered, to close the sliding door and thus prevent children from coming into dangerous proximity to the machinery; or at least, it would seem to require some satisfactory explanation of the fact, that while the car was in motion, so close to the sidewalk, and with no barrier between, there was no person about to guard against accidents.

I come now to consider the second question. Was the mother of the deceased guilty of negligence, in permitting him to escape into the street, and wander away

to the place of the accident. It appears that the parents of the child lived about a block from the coal yard, in a quiet though somewhat thickly settled portion of the city, inhabited principally by working people, with their families, and where there were but few vehicles passing. The father was away at work, and the mother was cleaning the room. The deceased, who is stated to have been an intelligent and forward child, four and a half years old, was permitted by the mother to go upon the front stoop, to play with two little boys, whose age does not appear. Deceased was charged not to leave the stoop, and the mother kept such watch over him as her work permitted, looking out three times during a period of twenty minutes; the last time she missed the child, and immediately started in pursuit, but too late, as she found him after he was killed.

Judge Grover, in Mangam v. Brooklyn City R. R. Co. 38 N. Y., 455, speaking of the degree of care required in keeping children from the street, says: "The counsel for the defendant insists that it must be such care as effectually to accomplish the object, and that any thing short of this is negligence. While, on the other hand, it is claimed by the plaintiff, that to constitute negligence in the parent or guardian, there must be an omission of such care as persons of ordinary prudence exercise and deem adequate for that purpose. The latter appears to be the conclusion required by the analogies of the law. Legal negligence is the omission of such care as persons of ordinary prudence exercise and deem adequate to the circumstances of the case."

Considering the situation in life of the parents, the character of the neighborhood where they lived, and the circumstances under which the deceased was permitted to be upon the stoop, I think it is going too far to say that the court should withdraw the question of negligence from the jury. A great many families living

in the city, who are not able to employ an attendant for children of that age, do, notwithstanding, permit them the liberty of the sidewalk, practically, with a great degree of safety. I think it will accord with our observation to say, that children of the age of deceased, are often more cautious, when out of doors, than those of a larger growth. What the law requires is ordinary and reasonable care, taking all the circumstances into account (See Karr v. Parks, 40 Cal. 188).

In Cosgrove v. Ogden, 49 N. Y., 255, the plaintiff was a boy nearly six years of age. The parents lived in New York city, in a locality very much like that in question here, and permitted the child to go upon the street unattended, where he was injured by the falling of lumber. Judge Grovek says, "The law can not assume that such boys are incapable of protecting themselves from any danger to be apprehended in such streets and roads. The question as to negligence of the parents was fairly submitted to the jury, and their verdict clears them from such an imputation." In the case last cited, it will be observed the child had permission to go into the street, while in the case before us there was an effort, a jury might say, a reasonable one, to keep the child upon the stoop.

It should also be remarked that the injury to the deceased did not accrue from any of the perils ordinarily, or naturally incidental to exposure in the street; for all that appears, the child may have been entirely competent and cautious enough to have avoided them; but the accident was the result of a cause, which the parent would not ordinarily be expected to anticipate, or guard against. If the infant was not sui juris, and it certainly cannot be held as matter of law that it was, it was incapable of forfeiting its remedy against a wrongdoer by its personal negligence (See 38 N. Y., 460; Ihl v. Forty-second St. R. R. Co., 47 N. Y., 317).

Some of the authorities noticed in the discussion of the first point also have a bearing upon this.

Although the facts upon which these questions arise, are substantially undisputed, it seems to me this is one of these cases, where different minds of equal intelligence might honestly draw different conclusions from them, and if so, the case should be left to the jury for their determination. This rule is well settled in this and in other States. Speaking of these doubtful cases, Judge Hunt says, in questions above cited, "Twelve men, of the average of the community, comprising men of education, and men of little education, men of learning, and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer, these sit together, consult, apply their separate experience of the affairs of life, to the facts proven, and draw an unanimous conclusion. This average judgment thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

My conclusion is that plaintiff was entitled to have the case submitted to the jury, and that a new trial should therefore be granted.

McCue, J., concurred.

Judgment reversed.

Magnin v. Dinsmore.

MAGNIN against DINSMORE.

New York Superior Court; Special Term, December, 1873.

COSTS.—OFFER OF JUDGMENT.

Under section 385 of the Code of Procedure, as amended in 1851 and 1856, the costs which plaintiff is entitled to, if he fails to obtain a more favorable judgment than that offered him, are those of proceedings prior to the offer; and all costs which accrued subsequently are to be taxed in favor of defendant.

The costs intended by this provision include disbursements.*

Elise Magnin sued William B. Dinsmore, as president of a joint stock company; and defendant offered to allow judgment, which plaintiff did not accept, but went to trial and recovered a verdict not more favorable than the offer. The judge who presided at the trial, therefore, awarded to the defendant all costs subsequent to the offer.

Upon the taxation of the costs by the clerk, the plaintiff claimed that he was entitled to the costs of the action for all proceedings up to the time of the offer. The clerk allowed this claim, against defendant's objection, and the defendant appealed to the court

FREEDMAN, J.—In section 385 of the Code, as amended by chapter 479 of the Laws of 1851, p. 903, the words "and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs," are separated from the words "from the time of the offer" by a comma, thus showing clearly that it was the intention of the legisla-

^{*} To the same effect, Klinck v. Kelly, page 135 of this volume.

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ture, which then for the first time enacted the prohibition of plaintiffs' recovery of costs in the cases contemplated by said section, to enact that such prohibition should run from the time of defendants' offer, and should not relate back as a penalty to the time of the commencement of the action. In Burnett v. Westfall, 15 How. Pr., 430, the same construction was adopted, notwithstanding the court failed to notice the existence of the comma above referred to.

It is true that the language of the section has been again amended in respects not necessary to be noticed here, by chapter 824 of the Laws of 1866, vol. 2, p. 1845, and that in the amendment, as published, the said comma has been omitted. But in view of the construction adopted by the supreme court, in Burnett v. Westfall, of which the legislature of 1866 must be presumed to have been cognizant, this bare omission does not per se demand a different construction; and as the one previously adopted is the more equitable one, it should be retained.

The plaintiff, having recovered a judgment for more than fifty dollars, is the prevailing party, and as such he is entitled to costs under section 303. Under section 304 such costs are allowed to her of course. But under the operation of section 385 they are to be confined to the time prior to the offer, and all costs which accrued subsequently are to be taxed in favor of the defendant. The costs to be taxed on either side include, as a matter of course, the necessary disbursements.

The taxation should be affirmed.

Brown v. Northrup.

BROWN against NORTHRUP.

New York Superior Court; Special Term, October, 1873.

RECEIVER.—ACTION FOR RECOVERY OF NEGOTIABLE PAPER.

In an action to recover possession of negotiable paper, alleged to have been transferred by plaintiff's collecting agent, to defendant, in payment of the agent's precedent debt, the court may properly appoint a receiver, if plaintiff shows an apparent right, and notwithstanding defendants' denial, especially where defendants are insolvent, or have suspended payment.

Elizabeth Brown brought this action against Hiram Northrup and Joseph S. Chick, to recover possession of a promissory note, which the plaintiff alleged she deposited in bank for collection, and which, as she alleged, the bank had delivered to the firm of Stewart, Steele & Co. for collection, and they had assumed to transfer to the defendants, in payment of their own precedent debt. It was further alleged that defendants had become insolvent. Upon the complaint and affidavit setting forth these grounds, plaintiff moved for a receiver to take and hold the note pending the action.

Charles Edward Tracy, for the motion.

Beach & Beman, opposed.

VAN VORST, J.—That the plaintiff deposited the note with the Haskell Bank for collection only, and that the same was received by Stewart, Steele & Co. from the Haskell Bank for no other purpose, seems to be established by the affidavits.

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If this be so, Stewart, Steele & Co. were not authorized to sell, transfer or pledge the same to the defendants.

And if it be true, as is alleged in the complaint, that defendants received the note from Stewart, Steele & Co. in payment of a precedent debt, they cannot detain the same from the plaintiff. A precedent debt is not a good consideration to uphold the transfer against the true owner.

In order that the application of a party to an action for the appointment of a receiver be granted, he should establish an apparent right to the property which is the subject of the action, and that the property is in danger

of being lost.

The plaintiff in her complaint and affidavit shows

such apparent right.

The defendants deny that the note was taken by them for a precedent debt. On the other hand, they aver that they took the same from Stewart, Steele & Co. without any knowledge of plaintiff's claim, and in the usual course of business;—that the note was taken by them as cash, was credited as cash to the parties from whom they received it, in their account with them, and that the whole amount was drawn from them by Stewart, Steele & Co. within a few days after the same was credited.

In disposing of an application for the appointment of a receiver, the ultimate right of the parties to the property in dispute is not determined. The safety and preservation of the property for the party justly entitled to the same are to be guarded and protected.

The plaintiff having shown by her affidavits and complaint an apparent right, if the property is in danger of being lost, notwithstanding the defendants' denial of the plaintiff's right, and their assertion of their own claim, a receiver should be appointed (Code, § 244, subd. 1).

Matter of Lien on 740 Broadway.

The receiver is an officer of the court, and truly represents the interests of both parties, and the property in the end is to be awarded to the actual possession of the party whose right and title is finally established.

The plaintiff avers the insolvency of the defendants. This is denied. But the defendants aver that they have suspended payment.

Such suspension by these defendants, private bank-

ers, puts in jeopardy the safety of the property.

If the suspension continues, and there is nothing averred to the contrary but that it may, it is quite likely to lead to consequences injurious to the plaintiff's rights, in the event that it be adjudged that she is entitled to the note, for the specific recovery of which this action is brought.

Motion granted.

MATTER OF LIEN ON 740 BROADWAY.

New York Common Pleas; Special Term, January, 1874.

DISCHARGING MECHANIC'S LIEN ON MOTION.

The court will not, and it seems, cannot, on motion, discharge a lien, or reduce the claim, on the ground that the notice was filed three months after the work had been done and the materials furnished, if the parties have pleaded to issue and gone to trial in proceedings to enforce the lien.

In the matter of mechanics' liens, filed in this court, against the premises, Nos. 740 and 742 Broadway, four motions were made. Three of the motions were to dis-

Matter of Lien on 740 Broadway.

charge three liens filed by W. Jones, on the ground that they were filed more than three months after the work was done and materials furnished. The fourth was a motion to reduce a lien, filed by the same person, to two hundred and fifty dollars, that being the amount of work done and materials furnished within the three months before the lien was filed.

J. F. Daly, J.—The motions must be denied, for the following reasons: Proceedings under the mechanic's lien act are now, and have been for the last two years, pending to foreclose all the liens in question, and the issues joined in those proceedings are trying before the referee appointed for the purpose. The grounds urged on these motions for discharging the liens are all available as defenses to them in such proceedings. The party (a subsequent purchaser) making these motions may be admitted to defend the premises from the liens, and be made a party to those proceedings, if he apply for the privilege. His rights, therefore, can be fully protected without resort to such motions as these.

II. After the commencement of regular proceedings under the act to foreclose the liens, and while the issues are trying, it would be an extraordinary exercise even of lawful authority to discharge the liens upon a summary application of this character made outside the actions. But I doubt if the court has the power to grant the orders asked for. The lien act (Laws of 1863, ch. 500, § 10) provides how liens may be discharged; and these express enactments negative the idea that the legislature intended to vest in the court the power to discharge the liens by other processes, or for other causes, and particularly upon summary motion.

In the case of Lutz v. Ey, 3 E. D. Smith, 630, no authority or reason is given for the statement that liens. may be discharged on motion in these cases, and the

statement is merely ob. dict., not necessary to the determination of the point before the court. The authorities cited on the other hand (Fettretch v. Totten, 2 Abb. Pr. N. S., 264, and McGuckin v. Coulter, 10 Id. 128), are entitled to greater weight.

III. Even if the court might, upon summary application, discharge the liens, it would be an answer to the motions that, after the parties interested had joined issue and proceeded to trial in regular foreclosure proceedings, the court should leave them to their remedy in such proceedings. The subsequent purchaser took the premises with notice of the liens and the proceedings, and stands in no better position than the other parties.

IV. The foregoing reasons apply with even greater force to the application for an order to reduce the amount of one of the liens. The issues as to that are before the referee, and should be tried in the regular way.

Motions denied.

CARNES against PLATT.

New York Superior Court; General Term, November, 1873.

FXCEPTIONS.—NEW TRIAL.—DELIVERY OF DEED.—
PRIVILEGED COMMUNICATIONS.—ATTORNEY
AND CLIENT.

Although on appeal from an order denying a new trial, asked solely on the judge's minutes, the appellant cannot insist that the verdict is against the weight of evidence, yet where appeal is taken not

only from the judgment, but also from the order made on a subsequent motion, founded on a case or exceptions, the court should examine the evidence to ascertain if it supports the verdict.

It seems, that the objection that the verdict is against the weight of evidence is not waived by omitting to ask that a verdict be directed, where the party subsequently moves for a new trial on a case and exceptions.

The decision in this case, reported in 1 Sweeny, 145, explained, and

the report corrected.

The rule that confidential communications between attorney and client are privileged applies, although the communications do not relate to litigation; and it extends equally to both parties.

Where a fact is immaterial unless connection with a party is proved, an offer to prove the fact, and subsequently to give proof of such

connection, may be refused, in the discretion of the court.

William R. Carnes was the plaintiff in this action, having been substituted for Arthur B. Carnes, deceased. George W. Platt and John L. Griffin were defendants. The facts are fully stated in our report of the previous decision, in volume 7 of this series, page 42. That decision was reversed by the court of appeals (see 2 Abb. Ct. App. Dec., 159, note).

The plaintiff recovered a judgment awarding him an estate for life in the premises described in the complaint, with a right to the present possession.

Defendant appealed.

James C. Carter, for the appellant.

Daniel T. Walden, for the respondent.

By the Court.—Freedman— J.—This is the third time that this case comes before the general term of this court. On each of the two former occasions (6 Robt., 270, and 1 Sweeny, 140), it was held that the facts of the case, as disclosed by the evidence, were not sufficient to establish that Houghton delivered the deed in question to Wetmore, for the use of Anthony, absolutely, and with intent to pass the title to Anthony prior to August

10, 1854, the date of the record of the judgment of the Merchants' Bank of Boston against Houghton, and that Wetmore so received it; and that consequently there was, as matter of law, no absolute delivery and acceptance before that day. The court of appeals, however, decided that it was for the jury to determine these questions, as questions of fact, in view of all the circumstances surrounding the transaction. On the third trial this was done, and the jury, under a charge which was quite favorable to the defendant, determined these questions in favor of the plaintiff. And although some other questions were formally presented by a motion to dismiss the complaint, yet the point that the evidence authorized no other verdict than a verdict for the defendant, was raised neither by that motion nor by a request for the direction of a verdict. The defendant throughout the trial treated the case as one that could be determined only by the jury, and having done so, if his motion for a new trial had been made solely on the judge's minutes, he would not, in the absence of error, be entitled to argue now that the verdict is against the weight of evidence (Rowe v. Stevens, 12 Abb. Pr. N. S., 389). But as the motion appears to have been subsequently made on a case and exceptions, and the appeal is from the order of the special term denying such motion, as well as from the judgment, it may be questioned whether, under the provisions of the Code, it is not the duty of the general term to examine the evidence for the purpose of ascertaining whether the verdict should stand. I have therefore made such examination, but have been unable to find anything in said evidence that under the law applicable to the case, as finally settled by the court of appeals, would warrant a disturbance of the verdict.

The counsel for the defendant requested the court below to submit to the jury, as a question for them, whether the assignment of the judgment to Martha B.

Carnes was procured by Charles W. Houghton, and for his benefit, without any intention to retain a lien or security on the judgment for the money advanced to obtain the assignment. The court refused to submit this question to the jury, and to such refusal defendant's counsel duly excepted. The law applicable to this branch of the case must, for the purposes of this appeal at least, be deemed to have been laid down in the opinion delivered by Mr. Justice Monell, on the second appeal. This opinion was the opinion of the court on that occasion, and not a mere concurring opinion, as erroneously reported in 1 Sweeny, 145. The same request was substantially made in that case. and the question now presented was therefore necessarily involved in the decision enunciated. The law as there laid down, stands unreversed to this day, and must for that reason still control. It is true, the evidence given on the present trial, so far as it relates to the request now under consideration, was more voluminous than that given on the preceding trial. But when tested by the rules laid down in the opinion of Mr. Justice Monell, above referred to, it was in legal effect no stronger than on the preceding occasion, and consequently the request for its submission to the jury was properly denied.

The offer of the defendant to prove by the witness Litch, that he was originally employed by Charles W. Houghton in relation to enforcing this judgment against the property described in the complaint, and in consequence of advice from the witness, arrangement was made between Charles W. Houghton, and Mr. Carnes, that Mr. Carnes should procure an assignment of the judgment in his own name, or that of some third person, and that the subsequent proceedings, in order to enforce the judgment, should be had under the direction of such assignee, was properly excluded for the reasons:

1. That because, so far as it went, it was insufficient to

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establish a defense; and, 2. Because it called for the disclosure of confidential communications that had passed between an attorney and his client. It has long been settled, as was pointed out by WIGRAM, V. C., in Walsingham v. Goodricke, 3 Hare, 124, that communications between solicitor and client made pending litigation, and with reference to such litigation; or made before litigation, but in contemplation of and with reference to litigation which was expected and afterwards arose; or made after the dispute between the parties followed by litigation, but not in contemplation of or with reference to such litigation, are privileged from disclosure, whether the party interrogated be the solicitor or the client. It has also been settled that professional communications between a party and his professional adviser, although they do not relate to any litigation either commenced or anticipated, are privileged where the solicitor is the party interrogated. This privilege now extends equally to both parties (Minet v. Morgan, 21 W. R., 467; L. R., 8 Ch., 361; Williams v. Fitch, 18 N. Y., 546, 550; Britton v. Lorenz, 45 N. Y., 51, 59).

The renewal of the last offer, with the addition that the offered proof was to be confined to what occurred between the witness and Houghton, and that it was to be connected subsequently with proof that Mr. Carnes was made cognizant of the arrangement—not by this witness—and assented to it, and came into it, was also properly rejected. It was open to the same objections as the first offer, and to the additional one that the proposed evidence was clearly not competent, unless the plaintiff was connected with it. The refusal to receive it before such connection was made was a matter resting in the discretion of the court, and therefore not the

subject of an exception.

The remaining exceptions appear to be equally untenable.

Thomas v. Kircher.

The judgment and order appealed from should be severally affirmed, with costs.

BARBOUR, Ch. J., and MONELL, J., concurred.

THOMAS against KIRCHER.

New York Common Pleas; Special Term, January, 1874.

SUPPLEMENTARY PROCEEDINGS.—ADJOURNMENT.— CONTEMPT.

A creditor in supplementary proceedings, who neglects to adjourn or extend the proceedings after the examination of the debtor has been had, thereby allows the proceedings to drop, and cannot subsequently, without notice to the debtor, compel a witness to appear and testify.

The plaintiffs in two actions against Kircher having recovered judgment, took supplementary proceedings against the defendant, and now applied to the court to punish F. W. Billings, a witness whom they had subpensed, for contempt in refusing to answer questions put to him.

J. F. Daly, J.—There was no proceeding pending in which the witness Billings could be required to appear and be examined as a witness. The original order or proceeding supplementary to the execution for the examination of the judgment debtor was not pending. It had terminated by failure to adjourn or extend it after his examination had been taken and sworn to

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by him. The judgment debtor was out of court, and

the proceedings were equally so.

The second order requiring the judgment debtor to appear and be examined was never served upon him, and he was not in court without such service. There can be no proceeding before the court for the examination of a judgment debtor, where he has not been brought in by personal service, or where, after such service, and after the return day, no continuation is had by adjournment. If the judgment debtor cannot, under such circumstances, be examined, a witness cannot be, for it is "on an examination," under section 292, that the witnesses may be examined by either party. The examination of the witness must be had at a time and place of which the judgment debtor has notice. It must be the "time and place specified" in the order for examination of the judgment debtor, or such time and place as the examination is duly adjourned to. This is necessary to protect the judgment debtor's rights in the due and orderly administration of justice.

The judgment debtor here had no notice of the time and place of the examination of the witness Billings, and no notice that any such examination was to be had. He was suffered to depart after his examination under the original order, and no adjournment was had nor further notice of proceedings for examination given to him. He was never served with the second order. To terminate the first proceeding no express order was necessary (Squire v. Young, 1 Bosw., 690). Jurisdiction is lost, unless the proceedings are continued by adjournment (Ammidon v. Wolcott, 15 Abb. Pr., 314; Howes v. Barr, 7 Robt., 453).

Motion denied.

Brown v. Niess.

BROWN against NIESS.

New York Common Pleas; Special Term, January, 1874.

JUDGMENT BY DEFAULT.—DISMISSAL OF APPEAL.—
MOTION AT SPECIAL TERM,

According to the practice of the New York common pleas, a dismissal of appeal is not the exclusive remedy for neglect to serve the printed papers, but the general term have power to affirm by default, and if they do so, the court at special term will not interfere with the judgment.

This action was brought by James A. Brown against Margaretta Niess. It now came before the court on defeudant's motion to set aside for irregularity a judgment of affirmance rendered at general term.

J. F. Daly, J.—Defendant appealed to the general term of this court from a judgment entered on the report of a referee. The case on appeal was settled October 25, 1873, and filed December 19, 1873. Due notice of argument for January general term, 1874, was given by respondent, and service admitted by appellant's attorney. Note of issue was duly filed for January term, 1874. No printed copies of the case were ever served by appellant on respondent, as required by rule 50. Respondent did not make any motion to dismiss the appeal under rule 50. When the cause was regularly reached in its order on the general term calendar, respondent answered ready. Appellant stated to the court that the cases had not been printed, and asked for a postponement of the argument. This was refused, and appellant not being ready to argue the ap-

Brown v. Niess.

peal, judgment of affirmance was rendered by the general term.

Appellant now moves at special term to set aside such judgment as irregular, on the ground: That where the appellant has failed to serve printed copies of the case pursuant to rule 50, the respondent cannot wait and take an affirmance of the judgment appealed from when the cause is reached, but must move under rule 50, to dismiss the appeal. The practice of the superior court to that effect is cited in support of this view (36 How. Pr., 366; 2 Sweeny, 700; 1 Jones & Spencer, 502).

The answer to this application is, that the general term of this court, with knowledge of all the foregoing facts, allowed the respondent to take an affirmance of the judgment, and did not require him to move to dismiss the appeal for want of service of the printed papers. That disposition of the question settles the practice in this court, which would seem to be that suggested in the superior court in 1862 (Oates v. Groupe, 15 Abb. Pr., 263). It was there said that the remedy to dismiss the appeal was not exclusive, but respondent might wait and take affirmance by default if appellant had not served his papers. The general term has jurisdiction of the appeal, to affirm, reverse, or modify the judgment appealed from, when a case has been made, settled and filed (3 Kern., 341; Id., 344; 29 Barb., 367; 32 1d, 664). The non-service of printed papers gives the respondent the right to make a summary motion to dismiss the appeal. If he do not choose to do so, but waits until the appeal is regularly called on for argument, it is so much to the advantage of the appellant, who is thus given additional time to print and serve copies of his case. But for giving such advantage to the appellant, respondent does not and ought not to lose his term if his case be regularly reached. This would be allowing appellant to benefit by his own Noe v. Christie.

laches. The practice followed by the general term must be considered as settling the question in this court.

Motion denied.

NOE against CHRISTIE.

New York Superior Court; Special Term, January, 1874.

EXECUTION.—JURISDICTION OF SUPERIOR CITY COURTS.

After the defendant is in custody of the sheriff, on execution, the plaintiff cannot issue another execution against the person of the defendant on the same judgment, even to another county.

Execution issued out of the superior court of the city of New York will be set aside, on motion, if it appears that defendant was a non-resident of the city, and it does not appear that the action was one within the jurisdiction of the court, as defined in Landers v. Staten Island R. R. Co., 14 Abb. Pr. N. S., 346.

An execution against the person of a defendant should be set aside, unless an execution against his property was previously issued to the sheriff of the same county, and returned unsatisfied.

Hannah M. Noe, administratrix of Isaac D. Hammond, deceased, recovered two judgments against John S. Christie, on which executions against the person were issued; and defendant now moved to vacate two of such executions, which had been issued to the sheriff of the county of Richmond. The grounds of the motion appear in the opinion.

Noe v. Christie.

E. J. Pattison, for the motion.

H. T. Marston, opposed.

FREEDMAN, J.—An execution against property may be issued to the sheriff of any county where the judgment is docketed, and several such executions may be issued, at the same time to different counties (Code, § 287).

But by the terms of section 288, an execution against the person of the judgment debtor can be issued only to a county within the jurisdiction of the court, after the return of an execution against his property unsatisfied, in whole or in part.

The defendant being in the custody of the sheriff of the city and county of New York, under and by virtue of an execution issued against his person, upon the judgment, for one thousand eight hundred and ninety-six dollars and thirteen cents, plaintiff had no right to issue subsequently, upon the same judgment, another execution against defendant's person to the sheriff of Richmond county. The arrest under the first of these executions is a satisfaction of the judgment while the imprisonment continues, and the issuance of the second was in direct violation of the provisions of the Revised Statutes (2 Rev. Stat., 364, § 7; 3 Id., 5 ed., 643, § 7).

The execution against defendant's person, issued to the sheriff of Richmond county, upon the judgment for one hundred and twenty-four dollars and eighteen cents, was perhaps properly issued, provided the action is one in which the jurisdiction of this court does not depend upon the personal service of the summons upon the defendant within the territorial limits of the city and county of New York (see Landers v. Staten Island R. R. Co., 14 Abb. Pr. N. S., 346), and provided an execution against the property of the defendant was first duly issued to said sheriff, and by him returned unsatisfied.

Nagle v. Stagg.

Neither of those facts was made to appear, or was claimed to exist, although it did appear that defendant, at the time of his arrest in New York, under the execution first above referred to, was a resident of the county of Richmond. For this reason, the execution for one hundred and twenty-four dollars and eighteen cents must also be set aside.

Motion granted, and executions set aside, with ten dollars costs.

NAGLE against STAGG.

New York Common Pleas; Special Term, January, 1874.

RECEIVER.—PENSION.

Moneys due to a debtor, from the public authorities, as a pension, can not be reached by a creditor of the pensioner until actually paid over to the debtor.

A pensioner has no property in future payments to be made to him on account of the pension.

J. F. Daly, J.—The order appointing a receiver of the property of defendant (a judgment debtor) was made on August 8, 1873. On November 1, 1873, the receiver received from the police commissioners eighty-seven dollars and fifty cents, being the quarterly payment on an annual pension of three hundred and fifty dollars, granted defendant as an ex-policeman. The pension is payable on the first days of February, May, August and November.

The receiver was not entitled to receive this sum. A pension is an allowance without consideration, and the payments of it are not made pursuant to any contract or obligation, but each payment is voluntary, and may be withheld by the government that grants it, pursuant to the conditions attached to the grant. The debtor had no property in any payments to be made on account of the pension, before actual payment. Any sum already paid, on account of the pension, to the debtor, or accrued, prior to the appointment of the receiver, may be seized by the latter when such sum has been actually paid to the debtor, but not before.

Motion granted so far as to require the plaintift's attorney and the receiver to repay the money in their hands.

No costs.

FIELD against VAN COTT.

New York, Common Pleas; General Term, January, 1874.

Administration Bond.—Estoppel.—Liability of Sureties.—Joinder of Parties.—Joint and Several Bonds.

In an action on an administration bond, the obligors are estopped from denying the jurisdiction of the surrogate over the estate; and they cannot question the decree of the surrogate, for the disobedience of which, the action on the bond is brought.

On a joint and several bond, an action lies against any one or more of the obligors, at the option of the plaintiff.

If the complaint alleges a joint obligation, it may be amended, after

proof of a joint and several obligation, so as to sustain the judgment against more than one, and less than the whole number.

The complaint in such an action need not allege the grounds of the surrogate's decree.

Edward L. Field, surviving administrator of Julia F. Brailesford, sued Joshua M. Van Cott, and Eli H. Reed in the New York common pleas, on an administration bond, made by defendants, together with Thomas G. Van Cott, administrator with the will annexed, of the goods, &c., of Gabriel Van Cott, deceased.

The complaint was substantially in the form which was sustained in the case of People v. Falconer, 2 Sandf., 81. But it also alleged that the decree had been docketed and execution issued and returned unsatisfied.*

Thomas G. Van Cott, the administrator, was not made a party; although he signed the bond.

The defendant, Joshua M. Van Cott, demurred to the complaint; and raised, besides the objections taken on the subsequent appeal, and which are fully stated below, the further objection that the grounds of the decree of the surrogate in the plaintiff's favor were not specially alleged. On this point, the court, at special term, in an opinion by ROBINSON, J., held as follows:

"As a pleading, such special allegations are rendered unnecessary by the provisions of section 161 of the Code of Procedure, which allows the statement, or general allegation, that any judgment or other determination of a court or officer of special jurisdiction was duly given or made, without stating the facts conferring such jurisdiction. Under this principle of pleading, the complaint, in my opinion, states a sufficient cause of action."

The defendants then answered, admitting the execution of the bond.

^{*} See People v. Gould, 4 Den., 551; People v. Laws, 3 Abb. Pr., 450.

After judgment against the defendant J. M. Van Cott, he appealed.

Francis C. Bowman, and David Dudley Field, for the respondent.

By the Court.—Robinson, J.—This action was brought against the defendants as sureties upon an administrators' bond given by Thomas G. Van Cott, in November, 1867, upon the granting to him by the surrogate of the city and county of New York, of letters of administration upon the estate of Gabriel Van Cott, deceased; and the alleged breach of the condition was his neglect or refusal to pay, according to the subsequent decree of the surrogate (made on February 24, 1871), out of the assets that had come into his hands, a debt adjudged to be due the plaintiff, payable from the estate of the intestate, sufficient assets for that purpose being disclosed.

The defense offered on the trial, in contradiction to the recital in the bond, and against the *prima facie* evidence furnished by the letters of administration and decree of February 24, 1871, was, "that at the time of the decease of Gabriel Van Cott (the intestate), at and immediately preceding such decree, he was not an inhabitant of the county of New York, but was an inhabitant of the county of Queens, settled there for the purpose of living there."

This defense was overruled, under exception, and such ruling is the subject of consideration on this appeal.

The offer of such a defense was rejected, upon the ground of estoppel, upon the consideration that the application for, and granting of the letters of administration, were upon assumption of the jurisdiction of the surrogate of the city and county of New York; and the bond being tendered to enable the principal to ac-

quire the office of administrator, and possession of the property of the intestate, and having effected that object, both principal and sureties were concluded from questioning the authority of the surrogate to grant such letters, or the liability of the sureties for the acts of their principal in the execution of his duties as such administrator, or the order made by the surrogate fixing his liability. The following authorities of the courts of our State support the ruling of the judge on the trial: The People v. Falconer, 2 Sandf., 81; Caldwell v. Colgate, 7 Barb., 256; People v. Norton, 9 N. Y., 178; The Supervisors of Rensselaer v. Bates, 17 N. Y., 245; Fay v. Ames, 44 Barb., 327; Fake v. Whipple, 39 Barb., 339; S. C., 39 N. Y., 394; Coleman v. Bean, 1 Abb. Ct. App. Dec., 394, affirming, 14 Abb. Pr., 39: The Cumberland Coal Co. v. Hoffman Steam Coal Co., 39 Barb., 19.*

In the People v. Norton, supra, the action was brought upon a bond given by a trustee substituted by the court of chancery, upon proceedings by petition without bill of complaint, in a case claimed to have been within the jurisdiction of the court, under the provisions of the statute allowing such substitution upon summary application, which, however, was denied by the defendants, and such alleged want of jurisdiction was presented as a defense to the bond. The court of appeals, however, held that as the substituted trustee got possession of the trust estate under color of such proceeding, both he and his surety upon such voluntary bond for the faithful administration of the trust estate, were precluded from questioning the authority under which he assumed to have acted. So

^{*}To the same effect is Onderdonk v. Voorhis, 36 N. Y., 358; and see Kelly v. McCormick, 28 N. Y., 320; affirming, 2 E. D. Smith, 503). And even the defense that the obligation was void for want of jurisdiction of the subject matter, may be waived (Vose v. Cockcroft, 44 N. Y., 415).

in the Supervisors of Rensselaer v. Bates, in the same court (supra), the defendant had become surety that his principal should faithfully discharge the duties of the office of treasurer of the board of supervisors, an office not within the province of the board to create; yet he was held liable on such voluntary bond for moneys received by his principal in such assumed capacity as treasurer of the board, although collected under resolutions which that body could not lawfully pass; and decided that both principal and surety were "precluded from questioning the power of the board, as principals, to confer upon him the authority (as treasurer) under which he acted."

In The People v. Falconer (supra), in the superior court, Justice Sandford, in a similar case to the present one, said: "It would be strange, indeed, if the sureties in an administration bond, after enabling their principal to possess himself of the personal estate by its execution, should be permitted to avoid its obligation upon the plea that the officer granting the letters, and receiving the bond, had no jurisdiction of the subject matter. The execution of the bond precludes both principal and sureties from gainsaying the surrogate's jurisdiction in any proceedings for the assets which the appointment and bond have enabled the principal to receive."

The distinction is plain between such cases as the present, and those arising upon proceedings in invitum, against a party, where he is compelled to give a bond or other obligation to procure the release of his person, or estate, under process or other claims sought to be enforced against him under proceedings void for want of jurisdiction in the officer who assumes to exercise it, and where the power under which a wrong is attempted to be enforced, only originated in such void jurisdiction. The voluntary presentation of such a bond as that sued on in this case, for the purpose of acquiring rights not

previously possessed by the party offering it, brings the case within the principle of both legal and equitable estoppel, by which a party is precluded in a court of justice from denying his own acts or admissions where they were designed to influence the conduct of another, and did so influence it, and where such denial would operate to the injury of the latter (Dezell v. Odell, 3 Hill, 215, Herm. on Estop., §§ 320, 321), or where he has bound himself by written instrument for the fidelity or good conduct of another in a private or public duty for acts done in that capacity (Herm. on Estop., § 250, 1). The authorities of our own courts fully sustain the liability of the defendants, as sureties upon the bond in suit for the assets that came into the hands of their principal, the administrator, without right of question as to the jurisdiction of the surrogate, by whom he was appointed to office.

Secondly. The decree of the surrogate, made on February 23, 1871, directing the payment to the plaintiff, by the administrator, of the amount for which (with interest), the recovery has been had, cannot be attacked collaterally (Laws of 1870, p. 826, ch. 359), upon allegation that plaintiff was awarded more than his just proportion of the assets that came into the hands of the administrator. An error in that respect was only the subject of an appeal from the surrogate's decree.*

Thirdly. The defense of non joinder of Thomas G. Van Cott, the administrator, upon allegation that he was a joint contractor in the bond in suit, was disproved by a production of the bond which, as to the obligors, was joint and several. The suit was against the sureties only, and against only two out of the three obligors, and the motion to dismiss the complaint was on the ground "that two out of three joint and several parties to the

^{*} To the same effect is Thayer v. Clark, 4 Abb. Ct. App. Dec., affirming 48 Barb., 243.

bond of the administrator, had been sued, and not one or three." Such was the rule of the common law, but it has been altered by the Code, section 120, allowing "persons severally liable upon the same obligation or instrument to be all or any of them included in the same action at the option of the plaintiff" (Carman v. Plass, 23 N. Y., 286; Brainerd v. Jones, 11 How. Pr., 569).

But as the allegation in the complaint was solely of a joint obligation, and the proof made, without objection, was of one *joint and several*, the plaintiff should be permitted to amend his complaint conformably to the proofs by inserting the words, "jointly and severally" after "bind themselves."

The judgment should be entered on the verdict for plaintiff.

Judgment accordingly.

STAPENHORST against THE AMERICAN MANUFACTURING COMPANY.

New York Superior Court; General Term, Nov., 1873.

NEGLIGENCE.—LANDLORD AND TENANT.—QUESTION FOR THE JURY.—DAMAGES.—PLEADING.

An action lies by a tenant of a part of a building against his landlord, who occupies other parts, to recover damages for negligence in allowing injurious substances to leak through from defendant's rooms into plaintiff's rooms; and the principle that, as between landlord and tenant, the landlord is not bound to keep in repair, without express contract, does not avair as a defense, if negligence be shown.

In such an action, loss of custom by plaintiff, in consequence of the latent injuries sustained by goods manufactured by him on the premises, is not admissible unless alleged in the complaint as special damages. Even gross or reckless negligence does not entitle the plaintiff to have the jury consider the injury done to the business, or the good will thereof, in estimating the damages.

Appeal from judgment entered upon the verdict of a jury, in favor of the plaintiffs, for one thousand seven hundred and fifty-nine dollars and fifty-nine cents. The facts appear in the opinion.

William Henry Arnoux, for appellant.

Moody B. Smith, for respondents.

BY THE COURT. - FREEDMAN, J. - The complaint alleged that the defendant let and rented to plaintiffs the first floor and basement of certain premises situated on the corner of Mott and Hester-streets, in the city of New York; that the plaintiffs occupied the demised premises for the manufacture of French and German mustard; that during the same time the defendant occupied the upper stories of said premises for manufacturing umbrella frames; that from May 1, 1868, to June, 1869, oil impregnated with iron filings or particles of iron finely pulverized, leaked, by reason of the negligence of the defendant, through from defendant's premises into plaintiff's mustard mills; that in consequence thereof, great damage has been done to plaintiff's business; that a great deal of their mustard has been ruined thereby; that the character and reputation of their manufactured mustard has been ruined, and that their business has been greatly injured thereby; that the plaintiffs have been damaged in the premises, in the sum of twenty-five thousand dollars, and that said damage has been done without any negligence on the part of the plaintiffs.

The gravamen of the charge, therefore, was negligence on the part of the defendant in carrying on its business operations in that part of the premises occu-

pied for that purpose.

Such negligence is not a positive element; but it consisted, if it existed, in a mere omission to do something which the law required under the circumstances, or, in other words, in a want of diligence without positive intention to injure the plaintiffs. The law required that in carrying out its operations, the defendant should use due diligence to prevent injury to the plaintiffs, that is to say, the defendant was bound to use the same amount of care, caution, attention, and discretion as the ordinary prudent man would put forth under precisely the same circumstances. The plaintiffs were bound to use similar diligence to guard against injury. The want or omission on either side of such care. caution, attention, or discretion, constituted negligence. Thus the duty of such diligence, and consequently the measure of negligence was relative on both sides, that is, relative to the actual situation of affairs, and the means of knowledge of the parties. These questions, therefore, had to be determined upon all the circumstances of the case, of which the relation of landlord and tenant was but one, and a comparatively unimportant one; and in determining them, it became necessary for the learned judge below, and for the jury, if the case was rightfully sent to them, to place themselves in the position of the persons whose acts had to be judged. The evidence given upon the trial, when considered in the light of these principles, was not of such a character as would have authorized the court to determine the diligence or negligence of either side as . matter of law, and, consequently, the questions relating thereto on both sides had to be submitted to the jury as questions of fact. For this reason, defendant's exception to the refusal of the court to dismiss the com-

plaint is clearly untenable. The case could not be disposed of on the simple theory that, as between landlord and tenant, the landlord is not bound to repair without express covenant

A more serious question is presented by the exceptions relating to the reception of certain evidence and to certain portions of the charge that bear upon the question of damages. Evidence had been given that plaintiff's business extended to the principal cities of the United States, and of the manner in which it was conducted; that in March, or April, 1869, mustard commenced to be returned by plaintiff's customers on the ground of its bad quality, and that in the course of some further time, all the mustard manufactured between January 1, and the month of June, 1869, was thus returned; that on investigation the said mustard was found to be utterly worthless, and that it had to be thrown away; that thereupon numerous attempts were made by plaintiffs to discover the cause, and that for that purpose, and at great expense, the mills were frequently stopped, cleaned up and thoroughly inspected, and chemical analyses were made of the mustard, and of the materials that entered into its manufacture; and that finally it was discovered that oil impregnated with iron was leaking from defendant's premises into plaintiff's mustard mills, and to all appearances, had been thus leaking for some time, and that this had worked the injury.

Evidence had also been given of the quantity of mustard thus lost, of its market value in a sound condition, and of the expenses incurred by plaintiffs in discovering the cause of the difficulty, and in obviating the injurious effects produced. Then it happened that Julius Wolff, one of the plaintiffs, on being recalled, was allowed to testify against defendant's objection and exception, that from the first of January to the first of June, of the preceding year, plaintiffs had about two

hundred customers, from which they realized a profit of not less than one thousand dollars per month, and which subsequently were all lost. This ruling was erroneous for several reasons. The complaint did not allege the names of said customers. It did not even contain an averment of loss of customers as an item of special damage, in general terms. No such loss could therefore be proven (Hallock v. Miller, 2 Barb., 630; Tobias v. Harland, 4 Wend., 537). The evidence already given showed affirmatively that no damage had occurred prior to 1869, and consequently, the testimony objected to related to a period too remote in any aspect of the case. For the damage complained of not being the result of intention, but of negligence, the law holds the defendant responsible only for such results as spring naturally, -i. e., according to the usual course of things, from defendant's negligent acts, unaffected by extraneous causes. Upon any such result the said testimony had no legitimate bearing, and that it may have prejudiced the defendant, becomes apparent, when it is considered in connection with the charge. The jury were instructed that in case they found that the negligence of the defendant was not occasional, but general and continuous, -in the language of the law, gross, they should, in addition to the market value of the goods actually spoiled, and the interest thereon, find from the evidence what damage was done to the business of the plaintiffs, and should also give them compensation for the loss of time and for the trouble that they were put to. Plaintiffs' counsel requested the court to charge further, that if the defendant was guilty of gross, or of reckless negligence, it is liable for the injury to the good will of plaintiffs' business. proposition the court submitted to the jury by saying: "I charge you that in effect, except I prefer not to use the words 'good will of the business,' but to say the damage done to the business, as it has been given in

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evidence before you." This was equivalent to saying that the jury had a right to consider the testimony objected to in determining the aggregate amount of damage.

The error committed in the reception of said testimony cannot, therefore, be disregarded, and this being so, it is unnecessary to express an opinion on the questions raised by the remaining exceptions.

The judgment appealed from should be reversed, and a new trial ordered, with costs to appellant to abide the event.

BARBOUR, Ch. J., and MONELL, J., concurred.

merler,

NEWFIELD against COPPERMAN.

New York Superior Court; Special Term, 1873.

Cause of Action.—Malicious Prosecution.—Libel.
—Privileged Communication.—Trial.

A complaint presented to a magistrate, which results in his sending a letter to the accused, requesting him to call and explain the charge, although it be maliciously made, is not ground for an action for malicious prosecution.

The rule that words spoken or written, in a judicial proceeding, by any person having an interest therein, &c., are absolutely privileged, if they were pertinent and material, is applicable, not merely to trials of actions and indictments, but includes every proceeding before a competent court or magistrate in due course of law, which is to result in a decision,—c. g., a complaint to the fire-marshal to cause him to institute an inquiry as to the cause of a fire.

This action was brought by Abraham Newfield against Hayman Copperman, and now came before the

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court on a motion by defendant on a case, for a new trial.

James C. Spencer, for the motion.

Samuel Hirsch, opposed.

FREEDMAN, J.—This action was instituted, and attempted to be tried, as an action for a malicious prosecution, but was finally submitted to the jury as an action for libel. After a careful re-examination of the evidence, and of the rulings made in the course of the trial, I still adhere to the view then expressed—that the action cannot be maintained as one of malicious prosecution. In an action of malicious prosecution, the gravamen of the charge is that the plaintiff has improperly been made the subject of legal process to his damage. The form of the prosecution is immaterial: nor is it material that the plaintiff was prosecuted by an insufficient process, or before a court not having jurisdiction of the matter; for a bad indictment may serve all the purposes of malice as well as a good one (2 Greenl. on Ev., § 449). But there must be a legal process of some kind, to which the plaintiff was subjected, and forced to submit. This element is entirely missing in the present case. A mere note or letter of a magistrate or officer, requesting a person to call, is not a prosecution.

The next question, therefore, is whether the action was properly turned into one for libel. Under the view which was then taken of the law applicable to this case, no opportunity being had to make a critical examination, and the counsel for the respective parties citing no authorities, the complaint seemed to contain sufficient averments for that purpose, and the state of the proof seemed to call for the change; and, if such view was correct, defendant had no business to be surprised by the ruling which permitted the change.

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After full consideration of the authorities submitted by the defendant on this motion, however, I have become satisfied that such view was not strictly correct. The true doctrine is that words spoken or written in a judicial proceeding by any person having an interest therein, or a duty to perform therein as witness or counsel, are not only conditionally, but absolutely privileged, and no action will lie therefor, however false, defamatory or malicious they may be, provided they were pertinent and material to the inquiry before the court or officer (Perkins v. Mitchell, 31 Barb., 461; Marsh v. Ellsworth, 2 Sweeny, 589; S. C., 1 Id., 52; Suydam v. Moffat, 1 Sandf., 459; Warner v. Paine, 2 Id., 195; Gilbert v. The People, 1 Denio, 43; Garr v. Selden, 4 N. Y., 91).

And the term "judicial proceeding" is not to be restricted to trials of civil actions or indictments, but includes every proceeding before a competent court or magistrate in the due course of law, or the administration of justice, which is to result in any determination or action of such court or officer (Perkins v. Mitchell, supra).

That the statements contained in the affidavit sworn to by the defendant, before the fire marshal of Brooklyn, were pertinent and material to the inquiry instituted by said officer, as to the origin of the fire, which had destroyed plaintiff's factory, cannot be denied. Aside, therefore, from the question as to the sufficiency of the allegations of the complaint, as a complaint for libel, it was not enough to instruct the jury that upon proof to their satisfaction of defendant's malice, and of the intentional falsity of his sworn statement, they were at liberty to render a verdict for the plaintiff. If, for the contents of that statement, plaintiff can maintain an action of libel at all, which under the decisions above referred to may perhaps be considered to be still an open question, it is clear that he can only do so upon

proof which takes his case out of the operation of the general doctrine above alluded to. Proof that the defendant maliciously contrived to induce the fire marshal to institute the inquiry, and to subpæna him, the defendant, and that the defendant thus expressly manufactured the occasion on which he bore false witness against the plaintiff, may perhaps have that effect. But without expressly deciding the point, it is sufficient for the purposes of this motion to say, that the case was not submitted to the jury upon this theory, but upon another and insufficient theory.

The motion for a new trial must be granted, with costs to defendant to abide the event, and plaintiff may have leave to amend his complaint, if he should be so advised. Order to be settled upon a notice of at least two days.

FISHER against THE WORLD MUTUAL LIFE INSURANCE CO.

Supreme Court, First District; Special Term, March, 1873.

PLEADING.—LIABILITY OF INSURANCE COMPANIES.— STOCKHOLDER'S ACTION.—PARTIES.

An action does not lie by a stockholder of a mutual life insurance company, formed under the act of 1853, to declare the franchise forfeited, and enjoin its exercise, and have a receiver appointed, on the ground that defendants made a false annual statement, in violation of the act of 1853.

The penalty prescribed by section 18 of the act of 1853, for any violation of the act, may be recovered in the name of the people, and

a dissolution may be sought through the attorney general in the case of insolvency; but the provisions of 2 Rev. Stat., 463, §§ 39, 40, that any corporation having banking or insurance powers, &c., which violates any act binding on it, may be enjoined at suit of a creditor or stockholder, &c., do not apply to violations of the provisions of the act of 1853, in reference to annual statements, or in reference to any matters specially provided for in the act of 1853.

The stockholder's remedy for any violation of these kinds is by causing the district attorney to sue for the penalty.

James W. Fisher sued defendants, alleging in his complaint that he owned fifty shares of the full paid stock of defendants, who were a corporation under the life and health insurance companies act of 1853, incorporated thereunder about September 24, 1866; that by the charter, each stockholder was entitled to receive a semi-annual dividend not exceeding three and a half per cent.; that no dividend had been paid upon plaintiff's stock; that defendants had received large sums for policies issued by them, and their receipts had been much greater than their expenditures, and that they had on hand money sufficient to pay to the stockholders the semi-annual dividends, to which stockholders were entitled; that defendants, in fraud of the rights of their stockholders, had divided profits among policy holders, and had knowingly and willfully violated their charter in this respect. Plaintiff also alleged that defendant's charter bound the directors to make a true annual statement, and that in the annual statement for 1868, they had charged a large sum as paid to the stockholders for interest or dividends, no part of which had in fact been paid, and that the omission, in subsequent years, to present in their annual statement the dividend which was due to stockholders, was through fraudulent intent.

Wherefore, plaintiff demanded a discovery of the books, &c., a dissolution of the corporation, an injunction, and the appointment of a receiver.

Defendant demurred by reason that: 1. There was a defect of parties plaintiff, in that plaintiff sued alone, and not in behalf of others. 2. A defect of parties defendant in that the directors were not joined. 3. There was a failure to state a cause of action.

F. Pulver, for the plaintiff.

W. P. Prentice, for the defendant.

HARDIN, J.—The plaintiff by his complaint asks our injunction restraining all the corporate acts and business of the defendant, and the appointment of a receiver of its effects, "to collect, sue for and recover the debts and demands that may be due."

The scope and object of the bill are aimed at a forfeiture of all the corporate rights of the defendant, and an injunction is asked for, which will suspend its operations.

It was settled by ample authority in this State, prior to April 21, 1825, that the court of chancery possessed no such power or right of interference with corporations (The Attorney General v. Utica Insurance Company, 2 Johns. Ch., '371; op. by Kent, Chancellor; Attorney General v. Bank of Niagara, 1 Hopk., 354, op. by Sandford, Chancellor.

The last case was decided in March, 1825, and following its announcement came the act of the legislature of April 21, 1825, which was adopted and incorporated subsequently into the revised statutes, and is now found in 2 Rev. Stat., Edm. ed., 484, §§ 39-41).

The first case which was decided under the act of 1825, was that of The Attorney General v. Bank of Chenango, 1 Hopk. 598, and in, delivering the opinion in that case, Chancellor Sandford took occasion to refer to the antecedent cases, and to declare that the new

power granted by the act of 1825, was invoked and applicable. Following that case was Verplank v. Mer-

cantile Insurance Company.

The vice chancellor granted ex parte an injunction and appointed a receiver. An appeal was taken to the chancellor, and the injunction was dissolved, and the receiver discharged, in June, 1831, and the case was remitted back to the vice chancellor of the first circuit, with permission to the complainants to apply to him for leave to amend their bill, so as to make the corporation defendant (2 Paige, 452).

In July, 1831, before the vice chancellor (of the first circuit), the complainants presented a petition for leave

to amend their bill (1 Edw. Ch., 46-48).

The vice chancellor allowed an amendment by inserting the corporate name of the Mercantile Insurance Co.

in the place of the president and directors.

The complainants having so amended their bill, in August, 1831, a motion was made by them, as stockholders, for an injunction to restrain the further operations of the company, and for the appointment of a receiver.

In the opinion of Vice Chancellor McCoun, the antecedent cases were referred to, denying the power of the court of chancery to interfere in such cases, prior to the act of 1825, under the general equity powers of the court; and the powers of the court to superintend and exercise visitorial powers over corporations were declared to depend upon sections 39, 40, 41 and 42 of the revised statutes referred to supra.

The Mercantile Insurance Company was not insolvent, and, therefore, the question to be examined was wholly dependent upon the alleged violation of the act of incorporation, or the violation of any other act of the legislature, binding upon said company.

The conclusion is reached, then, that when the directors are alleged to have fraudulently dealt with

the funds of the company, the remedy is not against the company in its corporate character, but against the directors by whom the fraud is committed (1 Edw., 94).

It is approved in Robertson v. Bullions, 9 Barb., 100, and 4 Abb. Pr. N. S., 107.

From the foregoing reference to the origin of sections 39, 40 and 41, of revised statutes, and the authorities quoted, it will be seen that the right of the plaintiff in this case depends, as was supposed by his learned counsel, and stated in the argument, upon the sections quoted.

When these sections were passed by the legislature, there was no general law in this State authorizing the formation of insurance companies.

After the adoption of the constitution of 1846, the first general law authorizing the formation of such companies was passed in 1849, April 10th.

That act was followed by an act of the legislature of 1851 amending the act of 1849.

Then came the act of 1853, ch. 463, entitled "An act to provide for the incorporation of life and health insurance companies, and in relation to agencies of such companies." The act of 1853, by section 22, expressly repealed so much of the acts of 1849 and 1851 as relates to life insurance companies.

The act of 1853 was amended in 1862, and it is not necessary here to give the amendments in detail.

The plaintiff alleges that the defendant was organized under the general act of 1853, and, in pursuance of its provisions, entered into the business now carried on by it.

It is, therefore, not necessary to look for any act or acts incorporating the defendant, for no such act or acts are to be found.

It cannot, therefore, be said that the defendant has, in the language of section 39 of 2 Rev. Stat. (page 484),

"violated any of the provisions of its act or acts of incorporation."

But section 39 of the *Rev. Stat.*, *supra*, also provides for a case where an insurance company "shall have violated any other act binding on such corporation."

It is not alleged that the defendant is insolvent, but, on the contrary, it is expressly alleged, by the plaintiff, that the defendant is wholly solvent.

It becomes important, therefore, to turn to the general act of 1853, and the amendments thereof, and to consider its provisions and the allegations of the complaint in connection therewith.

The plaintiff alleges that the defendant, by putting fourteen thousand dollars into its annual statement as cash paid to its stockholders as dividends or interest when, in fact, it was never paid, made a false statement in 1868.

Other allegations are made in the complaint, in respect to supposed irregularities and improprieties of the defendant, in respect to its annual statement, which are claimed to be in violation of law.

By section 18 of the act of 1853, it is provided that every violation of the act shall subject the party violating to a penalty of five hundred dollars for each violation, which shall be sued for and recovered in the name of the People, &c.

By section 12 of the act of 1853, an annual statement is required, and its contents are prescribed. If, therefore, there has been a violation of the provisions of the act of 1853, by the defendant, in respect to its annual statement, the penalty therefor is prescribed in the act of 1853, in the terms of section 18 already quoted.

An action may be brought in the name of the People to recover five hundred dollars, by the district attorney of the county in which the company is situated, and one half of the penalty will belong to the "informer," and the other half to the treasury of the county.

It therefore is clear that the violations of the act of 1853, in respect to annual statements by the defendant, may be the subject of the action provided for by section 18 of the act.

It will be observed that section 17 of the act of 1853, also provides for an examination into the affairs of a company formed under the general act by the comp troller, and he may also invoke the action of the attorney general, who may make application to this court for an order to show cause against the company requiring it to show cause why its business should not be closed. If its insolvency shall appear, the court may decree a disolution of the company.

It will be seen by these sections that a penalty is provided for every violation of the act, and the course is prescribed for a dissolution of the company in a case coming within its provisions.

It was suggested upon the argument by the learned counsel for the plaintiff, that sections 39 and 40 of the revised statutes are applicable, and therefore, that a stockholder can maintain this action.

This argument renders it necessary to consider section 11, of the act of 1853, (4 Stat. at Large, p. 219, Edm. ed). It is as follows: "All companies formed under this act shall be deemed and taken to be bodies corporate and politic, in fact and in name, and shall be subject to all the provisions of the revised statutes in relation to corporations so far as the same are applicable, except in regard to annual statements and other matters herein otherwise specially provided for."

The latter part of the words are very important and controlling upon the question now under consideration. The section is to be construed as though it read "companies formed under this act shall not be subject to the provisions of the revised statutes in regard to annual statements, and shall not be subject to the revised

statutes in respect to other matters herein specially provided for."

The object of the exception was to prevent the application of the revised statutes to the annual statements, and to prevent their application to any "other matters" specially provided for in the act of 1853 (Potter's Dwarris on Stat., 119; 1 Wash. C. Ct., 119, op. of Washington, J.; Minis v. United States, 15 Pet., 423).

Upon the construction of section 11 of the act of 1853, given, it must be concluded that sections 39 and 40 of the revised statutes are inapplicable.

The annual statements required of this defendant are regulated by the act of 1853.

So too, that act provides for every violation of the act. The violation of the act being "specially provided for" by it, the exception found in section 11 expressly excludes the application of the revised statutes to the violations of the act of 1853.

The remedy for any supposed violation is to be pursued under the act of 1853. That is the exclusive remedy in respect to annual statements, and in respect to every violation of the act.

If this plaintiff is prepared to prove a violation of the act of 1853, then he can become an "informer" against the company, and cause a suit to be brought by the district attorney of the proper county for the recovery of the five hundred dollars of penalty, and receive one half thereof, as provided in section 18, of the act.

He is not in a situation to bring a suit in his own behalf, asking no personal relief; a suit not stated to be in behalf of all other stockholders who will come in for a share of its benefits, who are similarly situated (45 Barb. 510); a suit in which an injunction and receiver are asked for, because of supposed violations of the act of 1853 (1 Edwards Ch., 95).

The directors are not parties, and if they are guilty

of frauds and illegal acts injuriously affecting the rights of the plaintiff, they should be made parties (5 Paige, 607; 9 Barb., 65; 45 Id., 510; 36 How. Pr., 20; 4 Abb. Pr., N. S., 107; 1 Kern., 243; 55 Barb., 667).

Courts of equity should not be called to usurp the province of directors, nor to govern them in the exercise, fairly and legitimately, of the discretion vested in them by the laws relating to the corporations in whose behalf they act.

Differences as to the internal management can be settled by stockholders at elections of directors oftentimes more judiciously than by the interference of a court of equity (51 Barb., 378).

The demurrer is sustained with leave to the plaintiff to amend upon payment of the costs thereof.*

MILLERD against THORN.

Court of Appeals, 1874.

TRIAL.—RIGHT TO OPEN AND CLOSE.—EXCEPTION.—
ISSUES.—PARTNERSHIP.—RELEASE OF RETIRING
PARTNER.

The right of the party holding the affirmative of the issue, to open and close at the trial, is a legal right, and if refused by the judge, an exception lies.†

In an ordinary action by several plaintiffs, to recover money due on contract made with them, an allegation in the complaint that they

^{*} Judgment was entered accordingly, and no appeal was taken.

[†] See also Opdyke v. Weed, 18 Abb. Pr., 223, note; Hecker v. Hopkins, 16 Id., 301, note; Gildersleeve v. Mahony, 5 Duer, 383; Slauson v. Englehart, 34 Barb., 198. For exceptions to this rule, see Fry v. Bennett, 28 N. Y., 324, affirming 3 Bosw., 200.

were copartners, becomes immaterial, so far as the issue is concerned, if the answer admits the contract; and a denial in the same answer, of the allegation of a partnership, does not entitle plaintiffs to open and close.

Creditors of a partnership, knowing that one partner had retired, and that the others had agreed to assume and pay the firm debts, took the negotiable note of the latter in payment of a firm debt. Held, that

he thereby discharged the other partner. *

Nelson Millerd, Theron J. Paine and Robert C. Brown, sued William B. Thorn and Albert B. Smith, in the supreme court, for goods sold.

The complaint alleged that plaintiffs were copartners at the time of the sale, and the time of suing, and it

alleged the sale in the usual form.

The answer of Thorn denied the allegation of plaintiffs' copartnership; and also expressly admitted that defendants had been copartners, and that while such partners, they bought the goods of the plaintiffs, but alleged that afterward they dissolved on an agreement that Smith should take the assets and pay all the debts; and that plaintiff, with knowledge of this agreement, accepted Smith's individual note for the balance due, which note he had not sued on, nor returued.

At the trial, both parties claimed the right to open and close; and the judge ruled that it was plaintiffs' right.

The effect of the evidence, as to the affirmative de-

fense, is fully stated in the opinions.

Defendant asked a verdict to be directed in his favor, and also asked that the complaint be dismissed, which were refused; and a verdict was found for plaintiff.

The supreme court affirmed the judgment, the following opinion being rendered. The question arising upon the pleadings in this case was, whether the plaintiffs had accepted the individual note of the de-

^{*} Compare Car v. White, 52 N. Y., 188, reversing 7 Lans., 1.

fendant Smith, in discharge, or in payment of the defendants who, as former copartners, were their joint debtors. The question was submitted to the jury on testimony, which was to some extent conflicting, and the result was adverse to the defendant Thorn. Whether the acceptance of the note was an extinguishment of the debt of the firm, depended entirely upon whether it was so agreed at the time it was given and received.

The rule is well established that no presumption to such effect arises, upon the delivery and acceptance of the note of a third person, in reference to a preexisting indebtedness, and that the burden of proving its acceptance in discharge of the debt rests upon the person seeking to set it up as payment (Noel v. Murray, 13 N. Y., 167). The same rule applies to cases of this character. The acceptance of the individual note of one partner after dissolution of his firm, in settlement of a partnership indebtedness, that is, in payment of the debt by agreement thereto, is an extinguishment of the joint obligation (Gandolfo v. Appleton, 40 N. Y., 533); but whether such an agreement was made or not, is a question of fact to be ascertained and determined by proof. The defendant Thorn had the advantage of these rules, but failed to satisfy the jury that Smith's note was accepted, as alleged. The result is, therefore, that he cannot succeed on this appeal unless some error was committed, and an exception thereto was duly taken. We have examined the exceptions and they are unavailable. The questions asked the defendant were legitimately within the scope of a cross-examination, controlled and regulated by the discretion of the presiding judge. If they related to collateral matters, the answers were conclusive. This is a familiar rule, and it needs no citation of authorities to prove it. inquiries were, however, not of that character, but either cognate to the examination in chief, or calculated

to show the interest of the witness in the subject matter, or his peculiar relations to the defendant Thorn, which might influence his statement. He was one of the defendants, and a generous latitude may be allowed when the party takes the stand either in his own favor or that of his co-defendant.

The exception to the question asked the witness Nelson Millerd, "Did you ever make any agreement with either of them (the defendants) in regard to taking Mr. Smith's note?" cannot avail the defendant. Whether such an agreement was made or not, was, it is true, a question of fact to be determined, as already suggested on the proofs, and is also, it may be said, a mixed question of law and fact. The inquiries related to the fact, the answer gave the circumstances bearing upon the subject, and the subsequent examination of the witness developed his knowledge of what would necessarily enter into the elements of such an agreement. It is evident, therefore, that though the inquiry to some extent involved a legal conclusion, the answer given, and the subsequent statements made were of the facts and circumstances attending and surrounding the alleged compact about receiving the note. The exception is therefore of no value.

The proposition that the defendant Smith became the principal, and Thorn the surety, under the circumstances disclosed, and that if the plaintiffs, with knowledge of them, took the defendant Smith's note for the indebtedness mentioned, without the knowledge or assent of the defendant Thorn, they thereby extended the time of payment, and released Thorn, cannot be maintained. The relation of the principal and surety existed between the partners, inter sese, after the dissolution of the firm, and the assumption of the debts of the copartnership by Smith; and the defendant Thorn would be protected in the application of the joint property to such relation (Crafts v. Mott, 4 N. Y.

604; Williams v. Bush, 1 Hill, 623). The mere acceptance of a note, however, by one partner who has assumed the obligations of his firm, or indulgence shown him by the creditor in reference to the payment of the debt, does not deprive the creditor of the right to recover the original claim, on delivering up the note to be canceled (Smith v. Rogers, 17 Johns., 340).

The partners continue to be principal debtors unless the creditor, by agreement with them, or one of them, changes the legal status of one or more towards himself. He could not, after knowledge of a dissolution, and of the assumption of the obligation of the firm by one member of it, contract personally with the latter upon the firm assets as a basis, and have them applied to the payment of such individual obligations. They are applicable to the joint debts (Williams v. Bush, supra,), but beyond that he is not affected by any arrangement between the partners, unless, with full notice of their relations to each other, he acts to the prejudice of the other in reference to the joint property. This case developes no fact or circumstance of that character.

The finding of the jury established the absence of any personal dealing with the defendant Smith, which deprived the plaintiffs of their right to pursue the defendant Thorn.

The judgment should, for these reasons, be affirmed.

Defendant appealed.

Joseph A. Shoudy, for defendant, appellant:—Besides the authorities elsewhere mentioned, cited, to the point, that the defendant was entitled to open and close: Hoxie v. Green, 37 How. Pr., 97; Huntington v. Conkey, 33 Barb., 218. That the facts were a defense: Evans v. Drummond, 4 Esp. 89, 91; Chitty on Cont., 267; Place v. McIlvain, 38 N. Y., 96; Bank of Albion v. Burns, 46 Id., 170; Marsh v. Pike, 10 Paige, 597).

F. A. Paddock, for plaintiffs, respondents.

GROVER, J.—The party holding the affirmative upon an issue of fact, has the right, upon the trial, to open and close the proofs, and to reply, in summing up the case, to the jury. This is a legal right, not resting in the discretion of the court, and when denied, the denial may be excepted to, and the ruling reviewed upon appeal from the judgment (Lindsley v. European Petroleum Co., 10 Abb. Pr. N. S., 107; S. C., 3 Lans., 176; Elwell v. Chamberlin, 31 N. Y., 614).

The defendant in this case held the affirmative of the issue. The admission in the answer that the defendant purchased the goods of the plaintiffs as alleged in the complaint, and became thereby indebted to them therefor, as thus alleged, rendered the question whether the plaintiffs were, at the time of such sale, copartners, wholly immaterial. The only facts to be tried were those alleged by the affirmative defense contained in the answer of the defendant Thorn. Upon a failure by Thorn to give such evidence to sustain this defense as would make a case proper for the consideration of the jury, the plaintiffs were entitled to judgment upon the pleadings for the amount claimed.

The co partnership of the plaintiffs was the only fact denied by the answer. The plaintiffs were entitled to judgment upon the failure of the defendant to prove his affirmative defense, whether they were copartners or not. There was no occasion to prove this; and testimony upon the point should have been rejected as immaterial.

The judge, therefore, erred in denying the defendant the right of opening and closing the proof, for which error the judgment must be reversed, unless it appears from the case that the defendant was not prejudiced by the error. This would so appear if there was no question in the case that should have been sub-

Millerd v. Thorn.

mitted to and determined by the jury, and if it was the duty of the judge to direct a verdict for the plaintiffs for the amount claimed by them.

The defense set up by the defendant Thorn was, that after the purchase of the goods from the plaintiffs by the defendants, the defendants dissolved the partnership existing between them;—that it was agreed between Thorn and his copartner Smith, upon such dissolution, that the latter should assume and pay all the debts of the firm, including that to the plaintiffs for the goods in question; that these facts were communicated to the plaintiffs, after which they received from Smith his note on time in payment of the demand. The defendant Thorn gave evidence, tending to prove these facts, such as made (the court held, and rightly, I think) a case that must be determined by the jury.

When a creditor of a partnership, after dissolution, knowing that one or several of the partners have agreed with the others to assume and pay the debts of the firm, takes the negotiable notes of those who should pay, in payment of the debt of the firm, he thereby cancels the claim against the firm and discharges the other partners (Story on Partnership, 276-8, §§ 155, 156, and notes; Collier on Partnership, book 3, § 3, cases cited; Arnold v. Camp, 12 Johns., 409; Waydell v. Luer, 3 Den., 410). I think the defendant was entitled to have the jury instructed substantially as requested by him; -that if the plaintiffs extended the time of payment of the debt to Smith until the note given by him therefor matured, Thorn was thereby discharged. By the agreement of Smith, upon the dissolution of the partnership between the defendants, to assume and pay the debt due the plaintiffs, he became, as between him and Thorn, principal debtor, and the latter his surety for payment. If the plaintiffs, with knowledge of these facts, made a valid agreement with Smith to extend the

time of payment, they thereby discharged Thorn (Colgrove v. Tallman, 2 Lans., 97; Oakley v. Pashaller, 10 Bligh's Parl. Cas., 548, 589).

The judgment appealed from must be reversed, and a new trial ordered, costs to abide event.

All the judges concurred.

Judgment accordingly.

Just relieur 5 45.

IRVINE against MILBANK.

Court of Appeals, 1874.

Affirming 14 Abb. Pr. N. S., 408.

JOINT DEBTORS.—RELEASE.

A release given in favor of one of several tortfeasors does not operate to discharge the others, unless under seal.

A debt, the existence and amount of which are not disputed, is not extinguished by payment of a less sum, unless a release by deed be given.

A covenant not to sue does not operate as a release in favor of those holden jointly with the covenantee, and not related to him as suscies, especially if the covenant reserves the right to proceed against them.

After judgment recovered against the owner and the occupants, respectively, of a tenement, for injuries suffered by reason of negligence in respect to its condition, two defendants, the occupants, appealed, and the other paid the plaintiff in the judgment a sum less than the judgment to be released from further liability, and took an instrument which recited the recovery of the joint judgment, the desire of the owner of the premises to compound and compromise, and obtain a personal discharge, without prejudice to the plaintiff's right to proceed on the judgment against the other

defendants, and, acknowledging the receipt of a sum less than the judgment, declared the owner exonerated from all individual liability to the full extent authorized by the joint debtor's release act of 1838, but without prejudice to the creditor's rights as against all the other defendants. This instrument was not sealed. Held, that this was neither a technical release, nor an accord and satisfaction, such as to exonerate the other defendants, or their sureties in the undertaking given on their appeal.

Whether it be a good release under the joint debtor act of 1838,—
query?

Irvine sued Wood Brothers as occupants, and Fowler as owner of premises, for negligence. Judgment was recovered. After appeal to general term, by the Woods, Fowler paid two thousand five hundred dollars, and plaintiff gave him an instrument in writing as follows: "Whereas, I, Alexander Irvine, of the city of New York, did, on the 1st day of July, 1867, recover a judgment, in the superior court of the city of New York, against Charles B. Wood, Frederick Wood and Jonathan O. Fowler, jointly, for the sum of six thousand one hundred and eighty-four dollars and three cents. And whereas, said Fowler is desirous of individually compounding and compromising said joint indebtedness, so far as he is concerned, and of obtaining his personal discharge therefrom without prejudice to said Irvine's right to proceed on said judgment as against all the other defendants therein: Now, therefore, , pursuant to the provisions of the act entitled, "An act for the relief of partners and joint debtors," passed April 18, 1838, and of the several acts amendatory thereof, and by force and virtue thereof, and in consideration of the sum of two thousand five hundred dollars to me in hand paid by said Fowler, the receipt whereof is hereby acknowledged, I, said Irvine, do hereby make this note or memorandum in writing for the purpose, under said acts, of exonerating, and I do hereby exonerate, said Fowler, from all and every

individual liability, by reason of such judgment, or incurred by him by reason of his being one of the joint debtors against whom the same was so recovered, to the full extent authorized and permitted by the acts aforesaid, but without prejudice to said Irvine's rights upon the said judgment as against all the other defendants therein named.

ALEXANDER IRVINE."

The instrument was not sealed.

The Woods then gave Milbank & Melao, as surety, on appeal to the court of appeals. The judgment was there affirmed (reported in 51 N. Y., 224). Plaintiff then sued the sureties on the undertaking, who alleged that, by the receipt of the twenty-five hundred dollars, the whole debt had been satisfied, inasmuch as one tortfeasor had been released, and claimed that the statute of 1838, as amended, did not make the defendants, Woods and Fowler, joint debtors, or jointly liable.

The superior court were of the opinion that joint tort feasors, after judgment in a joint action, were joint debtors within the meaning of the act of 1838, and the act of 1845, and gave judgment for plaintiff (reported in 14 Abb. Pr. N. S., 408). Defendants appealed to this court.

D. C. Brown, for appellants.

John L. Hill, for respondents.

Folger, J.—Let it be conceded that a release of one of several joint tortfeasors, from the cause of action, or from the judgment recovered thereon against them all, is a discharge of the others therefrom. Let it be also conceded (though not now so adjudged), that the instrument executed by the plaintiff, to Fowler, is not within the acts of 1838 and 1845, for the relief of partners and joint debtors. Yet then, the defendants in this action have not made out a defense therein.

This instrument is not a technical release of Fowler, which it must be, to operate as a discharge of his joint tortfeasors, the Woods. It is not under seal (Rowley v. Stoddart, 7 Johns., 207). Nor will the arrangement embodied in it operate as an accord and satisfaction. A payment of a less sum than the real debt will be no satisfaction, unless there follow a release by deed. That is the principle applicable when, as in this case, the existence and the amount of the debt are not disputed.

If it is not an exoneration of Fowler, under the statutes above named, then it is an agreement between him and the plaintiff, which must be construed and enforced between them according to the intention of both the parties to it, as that intention is manifested by the words they have used in it.

It is very plain that the plaintiff had no purpose to discharge the Woods from their liability upon the judgment. Rather he meant to, and did, save and reserve his rights against them. Nor was that the purpose of Fowler. If it is not effectual under those statutes, then it is of no more effect than a receipt in full to Fowler for all demands against him, or an agreement with him not to enforce further against him his liability by reason of the judgment (7 Johns., supra). This is not sufficient to discharge the Woods. The reason why a technical release would discharge them is that it would be an admission by Irvine, that his judgment had been paid. But this instrument is not such an admission; on the contrary, it admits but partial payment, and reasserts the right further to have and demand from them. It is true, a covenant not to sue is held to operate as a release. But this is in favor of him, with whom, or for whose benefit it is made; and then, to prevent circuity of action (Bank of Chenango v. Osgood, 4 Wend., 607).

It does not so operate in favor of those holden

jointly with the covenantee, and not related to him as sureties (Id.).

The reason advanced why this instrument is not within the acts for the relief of joint debtors, is that the defendants are not such, for that they have no right of contribution. Then the Woods are not harmed; rather they are helped, by as much as Fowler has paid upon the judgment. But if it were a case for contribution, this agreement between Irvine and Fowler could not defeat the right to seek it (Ib.).

It is not a prevalent answer to this, to say that the instrument refers to the joint debtor act, and is the same as though all the provisions thereof were incorporated in it, and that the act expressly requires the clerk to discharge the judgment of record.

The clerk has no authority to discharge the judgment of record under that act, unless in a case falling within it. If this case does not fall within it, then the clerk may not act. If it does, then is the instrument effectual, not only for such action of the clerk, but for all that which the plaintiff and Fowler sought. And, surely, the clerk would not have authority from it to discharge the judgment of record under the revised statutes (2 Rev. Stat., p. 362, § 22). This paper is not an acknowledgment of satisfaction of the judgment.

The unsoundness of the defendant's position is in the assumption that the instrument made to Fowler is a technical release, or tantamount to it. It is not a technical release, for it is not under seal. It is not tantamount to it, inasmuch as the whole tenor of it is at enmity with the notion of an admission of the payment of the judgment.

The judgment appealed from should be affirmed,

with costs.

All the judges concurred.

Judgment affirmed, with costs.

PUTNAM against THE BROADWAY, &c., RAIL-ROAD COMPANY.

Court of Appeals, 1873

CAUSE OF ACTION.—RAILROAD COMPANIES.—ASSAULT ON PASSENGER.—LIABILITY OF CORPORATION.

A railroad company is not liable in damages for a wanton and unprovoked injury to a passenger committed by a fellow passenger, unless it be shown that the servants of the company knew that the wrong-doer was an unsafe or dangerous man, and that there was reason to apprehend his injuring other passengers.

Mere intoxication is not sufficient to make it the duty of a conductor

to expel a passenger from a public conveyance.

The fact that the blow causing the injury was struck with a car hook belonging to the car is not sufficient to render the company liable, without proof of negligence or wrong on the part of the servants and agents of the company.

Ellen L. Putnam, as administratrix of her deceased husband, brought this action in the New York superior court to recover of defendants the damages sustained by the death of her husband. The deceased was riding in defendants' horse car, in the city of New York, in the evening, having two ladies under his escort. One Foster, who was intoxicated, mounted the platform of the car, and, after remaining there a short time, entered the car, and there insulted the ladies who were under protection of the deceased. Deceased, thereupon, appealed to the conductor. The conductor directed Foster to sit down and be quiet. This he did for a short time, but then went out upon the front platform, while the car continued on its route. When the car stopped, and the deceased, with his companions, alighted, Foster seized the iron car hook upon the platform, and, dismounting from the car, ran to the

rear end, where deceased was standing upon the ground, and Foster there struck him the fatal blow.

The superior court held that the company were liable, under these circumstances, for the death of their passenger, and gave judgment for the plaintiff. Defendants appealed.

John M. Scribner, Jr., for appellant.

John E. Parsons, for respondent.

ALLEN, J.—The questions presented upon this appeal are founded upon exceptions to the refusal to

non suit the plaintiff at the close of the trial.

If the evidence, upon any view that can be taken of it, entitled the plaintiff to a verdict, the judgment must be affirmed. The case was submitted to the jury with great fairness, and with accurate instructions as to the law, if there was, in truth, any evidence of any neglect of duty, or want of care on the part of the servants and agents of the defendant, to which the injury to, and death of, the plaintiff's intestate could legally be attributed.

The cases bearing upon the liability of railway companies, and other carriers of human beings as passengers for hire, for any defect in their roadways, carriages, and other vehicles for transportation, any neglect or want of care by themselves, their agents or servants, in the performance of the service undertaken, and for injuries caused by, or resulting directly from, the acts of the carrier or his servants, either to the passenger or third person, may be laid out of view, except as they serve to indicate the stringency and extent of the liability imposed by law upon carriers, and the extreme care and diligence required of them, in all that concerns their own acts, and the agencies and means employed by them.

The acts, neglects, and omissions complained of here, upon which the action is based, do not come within either class of cases referred to. The passenger was carried in a safe and proper manner, and there is no complaint of injury from any defect in the means of conveyance, or any act or omission of duty on the part of the servants of the company in respect to the plaintiff's intestate personally. The wrong and injury complained of is the wanton and unprovoked, as well as unlooked for, attack of a fellow passenger, resulting in the death of the individual assailed, and the defendant is sought to be charged for the resulting damages on the ground that the servants and agents of the company in charge of the car negligently and improperly omitted to exercise the police power with which they are invested for the protection of well disposed and peaceable passengers. There is no such privity between a railway company and a passenger as to make it liable for the wrongful acts of the passenger upon any principle (Pittsburgh, F. W. & C. R. R. Co. v. Hinds, 53 Penn. St., 512).

But a railroad company has the power of refusing to receive as a passenger, or to expel, any one who is drunk, disorderly, or riotous, or who so demeans himself as to endanger the safety, or interfere with the reasonable comfort and convenience of the other passengers, and may exert all necessary power and means to eject from the cars any one so imperiling the safety of, or annoying, others; and this police power the conductor, or other servant of the company in charge of the car or train, is bound to exercise, with all the means he can command, whenever occasion requires. If this duty is neglected without good cause, and a passenger receives injury which might have been reasonably anticipated, or naturally expected from one who is improperly received, or permitted to continue as a passenger, the carrier is responsible (Pittsburgh, F. W. & C. R. Co. v. Hinds,

supra; Flint v. Norwich and N. Y. Transp. Co., 34 Conn. 554; 6 Blatchf. 158).

In the case first cited a passenger was seriously injured by a large body of drunken and riotous persons, who came upon the train in defiance of the conductor in charge, and the court held that upon the evidence in that case, the only question which should have been submitted to the jury, was whether the conductor did all he could to quell the riot, and eject the rioters, and that if he did not the company were liable. The judge at nisi prius having submitted other questions, to wit: whether the conductor allowed improper persons on the train, and whether he allowed more persons on the train than was proper, a verdict for the plaintiff was set aside, and a venire de novo ordered. In the other case, the action was for an injury received by the plaintiff, a passenger on the defendant's steamboat, from the falling and consequent discharge of a loaded musket, by one of a great number of riotous and drunken soldiers engaged in an affray, and occupying a part of the boat assigned to passengers, the plaintiff being suffered to enter the boat and pass to this part of it without any warning from the officers of the boat, or others, of the presence of these soldiers, and the defendants making no effort to preserve the peace, or remove the offenders. Upon conflicting evidence the jury found for the plaintiff. Judge Shipman, in his charge to the jury, instructed them that "the defendants were bound to exercise the utmost vigilance in maintaining order, and guarding the passengers against violence from whatever source arising, which might reasonably be anticipated, or naturally be expected to occur in view of all the circumstances, and the number and character of the persons on board."

This, as a rule of duty and liability, is in strict analogy to, and consistent with, the rules by which the liability of common carriers of persons for hire is

determined in other cases, and seems to be well expressed and properly limited. It may be conceded that Foster, the individual who inflicted the injury resulting in the death of the plaintiff's intestate, was drunk when he came on the car; but so long as he remained quietly by the driver on the platform, neither entering the car nor molesting nor annoying the passengers in any way, there was no occasion for removing him, and the conductor would not have been justified in refusing to permit him to remain as a passenger. The fact that an individual may have drunk to excess, will not in every case justify his expulsion from a public conveyance.

It is rather the degree of intoxication and its effect upon the individual, and the fact that by reason of the intoxication he is dangerous or annoying to the other passengers, that gives the right and imposes the duty

of expulsion.

While Foster remained on the platform of the car, neither interfering with nor noticing the other passengers, there was nothing to indicate to the conductor that his presence was offensive to the passengers, or that there was danger of harm to any one from him.

There was, during that time, no occasion, and would have been no propriety in causing his removal from the car. He did, however, thereafter make himself peculiarly obnoxious to the other passengers, and, by his conduct and demeanor, grossly insult and annoy them, and gave occasion for the exercise of the power of removal, had the conductor seen fit or been called upon to exercise it; and had he continued his annoying practices, the conductor would have been faithless to his duty had he suffered him to remain on the car.

After Foster came into the car and insulted and intimidated the females under the protection of the deceased, the latter appealed to the conductor not to exclude Foster from the car, but to make him be quiet,

and the conductor directed him to sit down and be quiet; and he did thereupon take a seat on the opposite side of the car from the females and near the deceased. and after remaining there a short time, left the car and took his place on the front platform, the front door of the car being closed, and during the residue of the passage to Forty-sixth-street gave no occasion of complaint so far as appears. He was, during that time, peaceable and inoffensive. During the latter part of the ride there was no occasion for removing him from the car, unless the occasion and a necessity for such removal was furnished by his previous conduct, showing that he was a dangerous or improper person to remain. He had ceased to address or in any way insult or annoy the females upon being requested by the conductor to sit down and be quiet; and his ready compliance with that request, and his taking his place so soon thereafter on the platform and proceeding quietly and peaceably on his journey, was some evidence that there was no reason to apprehend a renewal of his insults in that direction, and justified the conductor in at least giving him the benefit of a further probation. This was precisely in accord with the suggestion of the deceased, neither he nor the conductor apprehending any serious harm or injury, certainly not a wanton and murderous attack upon anyone with a dangerous weapon. It is true that on taking his seat he did not observe the strictest rules of propriety, and by putting his feet on the seat, violated good taste and good manners, but it was not an offense of which the passengers could very seriously complain, or which essentially violated their rights, so long as there was abundant room for all, and there was no indecency in the position. This breach of good manners certainly did not tend to show that he was a dangerous man, and was condoned by his subsequent withdrawal from the seat, and the body of the car entirely. It is also in evidence

that while seated near the deceased he directed abusive language to him and made threats indicating an intent to do him some bodily harm before he left the car. But all this was in an undertone, and so far as appears was unheard by the conductor occupying his proper place on the rear platform, and neither the deceased or anyone else called the attention of the conductor to it. It was probably treated with indifference by the deceased and all who heard it, and regarded as the maudlin and senseless gabble of a drunken man, unworthy of notice, and incapable of creating any apprehension of danger or harm. But be this as it may, there is no evidence to justify an inference that the conductor did hear or could have heard or known of the abuse or threats, so that to him they were not evidence that he was an unsafe and dangerous man, or that there was any reason to apprehend injury to the other passengers from him or his acts. The conductor was only called upon to act upon improprieties or offenses witnessed by him or made known to him in some other way, and the defendants can only be charged for neglect of some duty arising from circumstances of which the conductor was cognizant or of which he ought in the discharge of his duties to have been cognizant.

There was no evidence tending to show that the conductor was in fault for not removing the person of Foster from the car. He exerted his police powers by causing him to desist from his offensive acts and approaches towards the females, and supposed he had done all that was necessary to preserve the peace and keep good order upon the car, and to secure the other passengers against further annoyance, as well as all that the deceased asked him to do. If the peace could be preserved, and the quietness and comfort of the passengers could be secured, as he supposed he had done, without the expulsion of the offender, the conductor could

hardly have been called upon to proceed to extremities and put the latter from the car by force. An unnecessary resort to force in ejecting a passenger from the car might have given the passengers, male as well as female, more pain and annoyance than would the mere presence of a drunken man, and possibly might have seriously imperiled their persons. There was no evidence of any neglect of duty on the part of the conductor in omitting to remove the person of Foster from the car, and whatever may be the duties or powers of the driver, otherwise than in subjection to the conductor, there is no evidence that he had any notice or knowledge of any impropriety of conduct or threatening language on the part of Foster, except as he must have witnessed what passed before Foster entered the car.

There is no evidence that he had knowledge of what transpired within the car, and after Foster's return to the platform, there was nothing, so far as appears, to excite alarm, or create apprehension of danger or disturb-

ance or annoyance of any kind.

There was an entire absence of evidence of any connection or complicity of the driver with Foster, or that the driver was responsible for the possession by the latter of the iron instrument with which the blows were inflicted that caused the death of Putnam. There was no proof from whence or of whom Foster obtained it, and none to show that the driver either acquiesced or assented to the taking of it by Foster, or that he knew that Foster had it. There was no evidence of negligence or omission of duty, or want of proper care and vigilance on the part of the servants and agents of the company in preserving order and keeping the peace on the cars, and protecting the passengers, to be submitted to the jury, most certainly none connected with the attack upon and death of the intestate, or to which it can be legally or logically traced.

The rule cannot be better or more concisely expressed than as stated by Judge Shipman, in Flint v. Norwich & N. Y. Transportation Co. That for any neglect or omission of duty in the preservation of order and the removal of dangerous and offensive persons by the owner of a public conveyance for the transportation of passengers, or his servants or agents, the carrier is liable for any injury to other passengers which might reasonably be anticipated or naturally be expected to occur in view of all the circumstances and of the number and character of the persons on board. It does not follow and cannot be presumed that because a man is drunk and is in that condition offensive to others, as well by his demeanor as in his appearance, that he is a dangerous man, and that his presence imperils the safety of others; that because he is drunk he may violently assault or murder others without provocation.

If there was anything in the condition, conduct, appearance or manner of Foster, from which the jury could reasonably infer that there was reason to expect or anticipate an attack upon the deceased or any other passenger, either while upon the car or in the act of leaving, the facts authorizing such inference should have been proved, and knowledge of them brought home to the conductor.

The injury to, and death of Mr. Putnam was immediately and directly caused by the murderous attack of Foster, and the carriage of the murderer by the defendant had no connection with and did not cause the act or directly contribute to it.

It is said in McGrew v. Stone, 53 Penn. St., 436, that the general rule is, that a man is answerable for the consequences of a fault which are natural and probable; but if this fault happen to concur with something extraordinary and not likely to be foreseen, he will not be answerable.

Ch. J. Bovill, in Sharp v. Powell, L. R., 7 C. P.

258, uses this language: "No doubt, one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act, are, by reason of some existing cause, likely to intervene, so as to occasion damage to a third person." The law ordinarily looks only to the proximate cause of an injury in holding the wrongdoer liable to an action, and if the damage is not the probable consequence of a wrongful act, it is not the proximate cause so as to make the wrong-doer liable (See Marsden v. The City and County Assurance Co., L. R., 1 C. P. 232; Bigelow v. Reed, 51 Maine, 325; R. R. & Co. v. Reeves, 10 Wallace, 191). This is the rule in cases of tort, when the conduct of the defendant cannot be considered so morally wrong or grossly negligent as to give a right to vindictive or exemplary damages (Baldwin v. U. S. Tel. Co., 45 N. Y., 744; Bayle v. Brandon, 13 M. & W., 738). The assault by Foster upon the deceased could not have been foreseen, and it was not the reasonable or probable consequence of the omission of the conductor to eject him from the car; and upon principle, as well as upon authority, the injury was too remote to charge the defendant for the damages.

In Scott v. Shepherd, 2 W. Bl., 892; Guille v. Swan, 19 Johns., 381, and Vandenburgh v. Truax, 4 Den., 464, the injuries were held to be the natural and direct result of the conduct of the party charged, although he did not intend the particular injury which followed. There was no evidence to carry the case to the jury, and the motion for a nonsuit should have been granted.

The judgment must be reversed and a new trial granted.

All the judges concurred.

Judgment accordingly.

MATTER OF GREELEY'S WILL.

Before the Surrogate of the County of Westchester; February, 1873.

PROBATE.—PARTIES.—RECORD OF SURROGATE'S COURT.—INFANTS.—TESTAMENTARY CA-PACITY.—BURDEN OF PROOF.—
LUCID INTERVAL.

It seems that any interest, however slight, or the bare possibility of an interest, is sufficient to entitle one to oppose probate; and that the executors under a will may oppose the probate of a later will, although the parties beneficially interested under the earlier have released their interest.

The surrogate cannot allow the testimony and proceedings on an application for probate to be withdrawn from his court, on the abandonment of the proceedings by the proponent.

Nor can the court, on the consent of the guardian ad litem of an infant, or his counsel, refuse or allow probate, without formal proof and an actual decision upon the merits.

Probate of will of Horace Greeley, deceased; before Surrogate Coffin.

The facts appear in the opinion.

Robert S. Hart, for Ida L. Greeley, proponent of the will of November 9, 1872.

George P. Nelson and Joseph H. Choate, for guardian ad litem of Gabrielle M. Greeley, infant heirat-law and next of kin.

Isaiah T. Williams, for contestants and proponents of the will of January 9, 1871.

The Surrogate.—On the alleged will of 1872 being presented for probate, Messrs. Samuel Sinclair, Charles Storrs and Richard H. Manning being the executors named in an earlier alleged will of the decedent, bearing date January 9, 1871, appeared and propounded such earlier will, and claimed that the will of 1872 was void for lack of testamentary capacity.

The causes thus became consolidated, and the question to be determined was, which was the last will and testament? The proponent of the last will and testament of 1872 caused the subscribing witnesses to that will to be examined, and made out a prima facie case for its establishment. The contestants then proceeded with evidence tending to show that the decedent was not, at the time of its execution, capable of making a will, by reason of unsoundness of mind. At an early stage in the progress of the case, and after releases had been executed by all of the legatees and devisees named in the will of 1871, save the children of the deceased and the Children's Aid Society, and after Miss Greeley had executed and delivered to her younger sister a conveyance of one equal half part of all the property claimed to have been disposed of by the will of 1872, the counsel of Miss Greelev and those of her sister objected that the contestants of the latter will had no longer any status in court, and no right to contest the same. In this I think they were wrong. Our statute (3 Rev. Stat., 5 ed. 146), provides that the executor, devisee, or legatee named in any last will, or any person interested in the estate, may have the will proved,

Any interest, however slight, and even, it seems, the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper (Will. on Ex., 284; Dayt. Surr., 158, 159). The executors named in the will of 1871 have clearly, by statute, an express right to have that will proved, if they can establish the fact that it is the last will, and they may rightfully contend against the validity of any alleged subsequent will as an obstacle in the way of establishing the will under which they claim. Their interest in this regard is very apparent. For, if they can succeed in establishing their will, the title to the movable goods of the testator, though in ever so many different and distinct places, vests in them, in possession, &c., -indeed, did so vest presently upon the testator's death (Will. on Ex., 531). The probate, or letters testamentary, is merely operative as the authenticated evidence, and not at all as the foundation of the executor's title; for he derives all his interest from the will itself, and the property of the deceased vests in him from the moment of the testator's death (Dayt. Surr., 213, citing Will. on Ex., 255). If, however, the will of 1872 should be established as the valid last will, then the title would be elsewhere. Thus, the proponent and contestants are trying their alleged titles. Besides, the Children's Aid Society, named in the will of 1871, had not released or abandoned its legacy, and had a right to expect the executors to look after its interests. At the close of the contest, and before exhausting the evidence on the part of the contestants, for alleged reasons, immaterial to the decision of the case, the counsel for proponent stated that under written instructions from his client, and sanctioned by her sister, any further effort to establish the will of 1872 was abandoned; that they withdrew from the controversy; and he intimated a willingness that the will of 1871 should be admitted to probate. The counsel for the guardian ad litem did

not dissent from this suggestion. Thereupon the executors produced the usual formal proof of the execution of the will of 1871, and applied for letters testamentary thereon. It seemed to be considered by some of the counsel that thus the will of 4872 and the testimony, and all proceedings relating to it, had been withdrawn from this court. But this, I apprehend, could not be done in this or any case. The statute says:

"That every surrogate shall carefully file and preserve all affidavits, petitions, &c. (3 Rev. Stat., 365, § 14, 5 ed.). Upon proof being made of the due service of the citation, the surrogate shall cause the witnesses to be examined before him. All such proofs and examinations shall be reduced to writing (Id., 148, § 56). The testimony taken by any surrogate in relation to the proof of any will shall be reduced to writing, and shall be entered by him in a proper book to be provided, and preserved as a part of the books of his office (1d., 167, § 75). The surrogate shall enter in his minutes the decision which he may make concerning the sufficiency of the proof or the validity of any will which may be offered for probate, and if he find against it, shall state the ground upon which the decision is made, &c. (Id., 150, § 69). The surrogate of each county shall provide and keep a book in which shall be entered all minutes of proceedings," &c. (Id., 365, § 13, subd. 4).

It will be seen that the language of these provisions is imperative, and that the surrogate has no discretion on the subject. The testimony and proceedings cannot, therefore, be withdrawn, but must remain as part of the records and files of his office, and a decree must be made. It would, however, be competent for all parties, being adults, in such a case, at any stage of the proceedings, to enter into a stipulation to be entered on the minutes to authorize the court to make a decree

in pursuance of the terms of the stipulation. But here this difficulty in regard to any such adjustment is encountered: an infant is a party to these proceedings. and neither the guardian ad litem, or his counsel can make any admissions affecting unfavorably the interests of the infant. This is a well-established rule (James v. James, 4 Paige, 115; Bulkley v. Van Wyck, 5 1d., 536; Stephenson v. Stephenson, 6 Id., 353); and in the case of Moore v. Moore, Sandf. Ch., 37, the vicechancellor ordered the testimony of an infant, taken in the cause under the objection of his guardian ad litem. to be stricken out. Perhaps the furthest the courts have gone in sanctioning the act of the guardian ad litem, in declining a contest in relation to the infants' rights is the case of Levy v. Levy, 3 Mad., 245, but that case clearly has no application here. All these cases, as well as all elementary works on the subject, indicate the tender solicitude with which all courts guard and protect the rights and interests of those whom the law considers as incapable of managing their own affairs.

The consent, if such it may be considered, of the counsel for the proponent, speaking for both children, to allow the will of 1871 to be admitted to probate, would be tantamount to an admission that the paper dated in 1872, and propounded as the last will and testament of the decedent, purporting to give a larger interest in his estate to his children than the will of 1871, is not, in fact, the last will, and ought to be refused probate.

Thus, it being impracticable, as I have endeavored to show, to withdraw the proceedings relating to the will of 1872, and equally impossible to accept or consider any such admission that may have been made by, or in behalf of, the infant, it would seem to remain my duty to consider, however reluctantly, the case

npon its merits, and to decide which, upon the testimony, shall be admitted and which rejected.

In doing so, this embarrassing fact is encountered at the outset, that the testimony on either side is incomplete and fragmentary, in so far as the will of 1872 is concerned. In the midst of the evidence on the part of the contestants, counsel for proponent, and for the infant, announced their withdrawal from the contest, pursuant to the request of those whom they represented, and proponent's counsel signified his willingness to allow the will of 1871 to be admitted to probate. To this course no objection seemed to be made. The counsel for contestants appears, therefore, to have assumed that no further evidence was necessary on his side, and the matter was, in this somewhat anomalous condition, and without argument by the learned counsel left to the court to determine.

In every case, a testator is presumed to be To this presumption is usually superadded the testimony of subscribing witnesses, generally non-experts, to the effect that they considered the testator to be of sound and disposing mind and memory. Here the subscribing witnesses testified to a compliance with the usual formalities by a person whom they considered of sound and disposing mind and memory. Thereupon, and without regard to any facts or circumstances occurring at any other time or place than the scene of the execution, the proponent was held to have made out a prima facie case, and the burden of proof was thrown upon the contestants to establish the fact, if they could, that some one or more of these formalities had not been complied with, or that the testator was incapable of making a will by reason of unsoundness of mind. They sought to assail its validity on the latter ground. It is, perhaps, unnecessary to detail, with any degree of minuteness, the testimony which the contestants

adduced with a view to establishing insanity. Suffice it to say that the intimate associates of the decedent observed, at least as early as November 1, 1872, in his acts, appearance, and conversation, indications of aberration of mind which gave them much concern; that this condition continued down to November 9, the day of the date of the will in controversy, on which day his conduct and language was of so marked a character as to leave no doubt of his insanity. The painful history, from this period down to about November 20, when he was removed, by his friends, to the private asylum of Dr. Choate, near Pleasantville, is furnished by the testimony, and there it ceases. From that date to a few hours previous to his death, on November 29, we have no direct evidence as to his bodily or mental condition. Upon this evidence, in connection with the peculiar provisions of the will, in the light of the fact, as alleged, that Gabrielle was, if anything, his favorite, and the contrast between it and other wills theretofore made by him, and the further fact that in it he nominates no executor, when, in 1871, he had urged upon his friend, A. J. Johnson, as the chief reason why he should make a will, that he could thus appoint his own executor, would seem to be the grounds upon which the contestant's counsel relies, as establishing testamentary incapacity, and as so far overcoming the testimony of the subscribing witnesses as to again cast the onus probandi upon the proponent. In this I am inclined to believe he is right. To say the most of it, the evidence of the subscribing witnesses is very meagre and unsatisfactory when we consider the precedent facts. Here was a person who had manifested such palpable indications of unsettled reason as to cause his most cherished and intimate friends the liveliest anxiety; who was by their advice, and under their direction, doubtless, removed to the private asylum of an eminent physician, where the treatment

of diseases of the brain was made a specialty, and who remained under his treatment until the disease culminated in death. At the time of the factum of the alleged will, and, indeed, during that day, no word was uttered by the dying man other than the monosyllables, "well," "yes," and "no," in response to questions put to him. When first asked if the paper was his last will and testament, he, it would seem, with his eyes closed, said, "no," and, on the question being repeated in a different form, he opened his eyes, slightly raised his head, looked at it, and said, "yes." When asked by Mr. Stuart if he would have him, who was one of his most intimate friends, as one of the witnesses, he said "no;" at which Mr. Stuart was so evidently astonished that he repeated the question by asking "Will you have me, John R. Stuart, witness it?" and the response was again "no." I attach very slight importance to the incident of the hand-shaking with Mr. Reid. While all of these circumstances may be consistent with the soundness of a mind theretofore sane, they certainly, it strikes me, are not inconsistent with the continued unsoundness, when it has been once clearly established. The onus was upon the proponent to remove any doubts upon the subject, were it practicable so to do.

The above scene, as the evidence shows, occurred about an hour before the dissolution of the decedent. There is no evidence as to when this will was written, or as to the attendant circumstances, or as to where it was found, or that the decedent had any agency whatever in its production for formal execution, and I am not permitted to have the benefit of the evidence of Dr. Choate, the professional expert under whose care and in whose house the patient was for rine days immediately prior to his death, and who was in the house at the time of the so-called execution of the alleged will. Under the peculiar facts of the case, had the parties

all been of age, the intendment would, in consequence, have been strongly against the proponent. On the other hand, because there is an infant party, principles of law cannot be relaxed, nor unwarranted inferences from evidence be made in her favor. In these respects the law knows no distinction of sex or age. "Soundness and perfectness of mind are held, in law, to be absolutely requisite in the making of wills; the health of the body merely not being regarded. If general insanity be proved, it is presumed to continue until a recovery be shown, and the party alleging a restoration to sanity must prove his allegation" (Groble v. Barr, 5 Barr, 441).

With respect to persons of unsound mind having lucid intervals, it is sufficient if the evidence adduced in support of the will shall establish that the party afflicted had intermissions, and that there was an intermission at the time of the act; but the order of proof and presumption is thereby inverted. For where insanity is established, then the party who would take advantage of the act done during an interval of reason must prove such act to have been so done (Cartwright v. Cartwright, 1 Phillim., 90). In this instance, we have the general insanity of the decedent established, and no sufficient proof that at the time of the factum there was an interval of reason. Applying the above principles to the state of facts, it follows that the will of 1872 must be refused probate.

The will of 1871 having been duly proven, must therefore be admitted as the last will and testament of Horace Greeley.

N. s.-xv.-26

Caspar v. O'Brien.

CASPAR against O'BRIEN.

New York Superior Court, General Term; November, 1873.

EVIDENCE.—QUESTIONS OF FACT AND OF OPINION.

In an action against the sheriff, to recover the value of goods taken by him from plaintiff, under process against a third person, where the plaintiff claims under an assignment made by the transferce of the debtors in the process, the question whether such transferce was the owner of the goods at the time of the alleged assignment to the plaintiff, calls for a fact, and not a conclusion of law; or if it be a conclusion of a law, this objection should be brought out on cross-examination.

Such a question is not objectionable as embracing the whole merits of the case.

This action was brought by Jacob Caspar against James O'Brien, sheriff, &c., and now came before the court on appeal from a judgment entered upon the verdict of a jury in favor of the plaintiff, and from an order denying defendant's motion for a new trial upon the judge's minutes.

- A. Oakey Hall, for appellant.
- R. S. Newcombe, for responden

BY THE COURT.—FREEDMAN, J.—This action was brought by the plaintiff against the late sheriff of the city and county of New York, to recover the value of certain merchandise taken by said sheriff from the possession of the plaintiff under process of court not directed against the plaintiff. In March, 1869, the goods were sold by Wheelright, Pippey & Co., of New York, to the firm of Marks & Cohen, then doing business at No. 100 Chambers-street, in the city of New York.

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Shortly afterwards the goods were sent to Paterson, N. J., where Marks & Cohen kept a branch store. Evidence was also given that in May, 1869, another Marks, named Harris Marks, bought out the store of Marks & Cohen at Paterson, together with the stock of goods therein contained, which included the merchandise above referred to. Harris Marks is a son-in-law of the plaintiff, and plaintiff claimed that on June 16, 1869, he, through his agent, one Jacobs, who is another son-in-law of plaintiff, advanced seven hundred and fifty dollars to Harris Marks, and that he received, through said agent, as security for the loan, the merchandise in controversy. It was contained in four cases, and sent from Paterson to New York.

The sheriff levied upon these cases, while they were on storage in the storehouse No. 28 Jay-street, in the name of the plaintiff, under and by virtue of an attachment procured by Wheelright, Pippey & Co. against the property of Marks & Cohen, and in doing so claimed that they really belonged to Marks & Cohen, and that the ownership in Harris Marks, as claimed on the part of the plaintiff, was simulated, and constituted merely part of a scheme to defraud the creditors of Marks & Cohen. The questions of fact involved in the case were fully and fairly submitted to the jury, under a charge to which the defendant took no exception, and they were determined by the jury in favor of the plaintiff.

No motion to dismiss the complaint was made at any time, nor did the defendant ask for the direction of a verdict. Defendant's motion for a new trial upon the judge's minutes was, therefore, properly denied (Rowe v. Stevens, 12 Abb. Pr. N. S., 389).

The only remaining questions relate to the rulings of the court below in permitting Harris Marks to answer certain interrogatories. He was called as a witness for the plaintiff, and placed upon the stand Caspar v. O'Brien.

after defendant had rested. He testified that in June, 1869, he had a money transaction with the plaintiff: that he took seven hundred and fifty dollars from the . plaintiff and gave him goods as security therefor. He was then asked: "At that time, who did these goods belong to?" The defendant, by his counsel, objected to the question, on the ground that it was incompetent, and that it called for a conclusion of law on the part of the witness, and not for a statement of fact. The court overruled the objection, and permitted the question to be answered; to which ruling the defendant excepted. The witness thereupon testified that at that time the said goods belonged to him; that they belonged to him when he gave them to the plaintiff as security: that he delivered them to Jacobs in Paterson; that the name of Harris Marks was then up in the store, and that he was in the possession of the store. He was then asked the further question: "And the owner of it at that time?' This the court also permitted to be answered against the objection and exception of the defendant, and the witness said: "Yes, sir, I think about a week or two previous to the time I borrowed that money of Mr. Caspar, I had been in possession of the store." These inquiries called for a fact, and not for a conclusion of law, as claimed. The witness was in a position to know how the fact in that respect was. The questions were, therefore, admissible, and it was the office of a cross-examination to discover whether the witness stated in his answer a fact or a conclusion. This was expressly held in Walsh v. Kelly, 42 Barb., 98 (104), which involved the admissibility of a precisely similar question. In Knapp v. Smith, 27 N. Y., 277; Sweet v. Teeth, 14 Id., 467, and Davis v. Peck, 54 Barb., 425, analogous questions were sustained for the same reason.

Neither the questions in the case at bar, nor the answers thereto, were subject to the criticism that they

or either of them embraced the whole merits of the case, and left nothing for either court or jury to decide. The inquiries were as to the fact of naked ownership at a particular time, while the issue to be determined by the jury involved the bona fides of the possession and ownership at the time of the loan made by the plaintiff.

The judgment and order should be affirmed, with

costs.

BARBOUR, Ch. J., and MONELL, J., concurred.

HOYT against BAKER.

Supreme Court, Second Department, Second District; General Term, February, 1873.

WAREHOUSE RECEIPTS.—ACTION FOR THE POSSESSION OF GRAIN.

Plaintiffs agreed to sell A. & Co. a cargo of corn. A. took a sample, and plaintiffs sent the boat and cargo as directed by A. & Co. to the warehouse of B. & M., warehousemen, to have the corn discharged. The warehouse receipt was made out in the name of A. & Co., and delivered to them by the warehousemen, and they immediately pledged the receipt with C. & Co., as security for a loan made on the faith of it. A. & Co. were at the time insolvent, and failed to pay the price of the corn. Held, that the sellers not having informed the warehousemen of their claim, the warehousemen were not bound to protect it; and that the buyer's possession of the receipt was equivalent to possession of the corn, and C. & Co. having made advances on the receipt, in good faith, should be protected.*

^{*} Compare the next case.

Jesse Hoyt, Leonard Hazeltine, Jr., and Theodore J. Husted, sued Gorham F. Baker and others, to recover the possession of a cargo of corn, and damages for its detention. The defendants were;—Gorham F. Baker and Gilbert Montague, warehousemen in the city of Brooklyn; Abiel Akin and Lloyd D. Pierce, merchants, who had contracted with plaintiffs for the purchase of the cargo, and had received the warehouse receipt therefor; and Henry J. Cammann and William H. Morrison, commission merchants, to whom Akin & Co. had indorsed the warehouse receipt, and who had made advances to Akin & Co. thereon. The details of the evidence appear in the opinion.

Upon the trial of the cause at the circuit, the court directed a verdict against Akin & Co., and left it to the jury to determine, under its instructions as to the law, whether there should be a verdict for the plaintiffs as against the other defendants. The main question of fact submitted, was whether there was an intention on the part of plaintiffs to transfer the property, and on the part of Akin & Co. to receive it.

The defendants Cammann and Morrison moved at special term for a new trial, which having been denied, they appealed to the general term, both from the judgment and from the order denying the new trial.

Akin and Pierce also appealed from the judgment.

W. W. Goodrich, for Cammann & Morrison, appellants:—I. The court erred in refusing to dismiss the complaint as to Cammann & Morrison on the pleadings, for the action is to recover specific possession and damages, but the complaint does not allege the demand on Cammann & Morrison, nor that they took a receipt with knowledge of the transactions between A. & Co. (Jessop v. Miller, 2 Abb. Ct. App. Dec., 440; Hall v. Robinson, N. Y., 293; Whitney v. Slauson, 30 Barb., 278; Fuller v. Lewis, 13 How. Pr., 220).

II. The court erred in refusing to direct a verdict upon the evidence (Rawls v. Deshler, 4 Abb. Ct. App. Dec., 18; Hollingsworth v. Napier, 3 Cai., 182; Bank of Rochester v. Jones, 4 N. Y., 497; Halliday v. Hamilton, 11 Wall., 560; Ballard v. Burgett, 40 N. Y., 318; Rowley v. Bigelow, 12 Pick., 310; Smith v. Dennie, 6 Id., 266; Paddon v. Taylor, 44 N. Y., 371; Swift v. Tyson, 16 Pet. U. S., 15, 16; First Nat. Bank v. Green, 43 N. Y., 298; Belmont Bank v. Hoge, 35 Id., 68; Nichols v. Michael, 23 Id., 266; Nichols v. Pinner, 18 Id., 295; Hall v. Naylor, 18 Id., 588; Western Transp. Co. v. Marshall, 6 Abb. Pr. N. S., 282, court of appeals, 1867; Rowley v. Bigelow, 12 Pick., 306).

C. Van Santvoord, attorney for the plaintiffs.

Scudder & Carter, attorneys for Baker and Montague.

R. H. Underhill, attorney for Akin & Co.

TAPPAN, J.—In October, 1868, the plaintiffs agreed to sell the defendants Akin & Co., a cargo of corn per boat *Toronto*. Mr. Hazeltine, one of the plaintiffs, testifies: "I told Akin I would sell him this load of corn at one dollar and fourteen cents, he to pay demurrage, if boat not unloaded that day. I asked him where I should send the boat to have it unloaded; he said to Baker & Montague's store."

Akin took the sample box containing the corn, and the plaintiffs sent the boat and cargo, as directed by the buyers, to the warehouse of the other defendants, Baker & Montague, to have the corn discharged. The warehouse receipt was made out in the name of Akin & Co., the buyers; it came to their hands from the warehousemen, and they immediately, on the day they received it, negotiated a loan of seven thousand five

hundred dollars thereon with the other defendants Cammann & Morrison, who thereupon received the warehouse receipt or certificate with the indorsement of Akin & Co. The sale was on Saturday. The boat was discharged Saturday afternoon and Monday, on which day the warehouse receipt was issued and loan obtained. The buyers became insolvent shortly before or immediately after they had made the contract of purchase of the corn, and they failed to pay the plaintiffs therefor. Their insolvency, at the time of the purchase, is not questioned even by themselves, but they claim that, as a fact, it was not then known to them. Plaintiff Hazeltine, on ascertaining that Akin & Co. had the warehouse receipt, went to them and demanded it. They said they had borrowed seven thousand five hundred dollars on it. Hazeltine then testifies: "I told Akin, the property being ours, the money was ours, and I wanted the money." Akin, in his testimony, says, "that it was only the third day after sale, and the money was not due the plaintiffs at the time of this demand."

The plaintiffs demanded the property of Akin & Co. without delay, and then brought replevin. The defendants Cammann & Morrison, counter-bonded and took possession of the grain, and subsequently sold the same for other advances. No demand of the grain was made of them, but the plaintiffs demanded the warehouse receipt of them.

The plaintiffs, to maintain their right to the property, aver, that by the terms of sale and the custom of the trade, there was to be no possession in the buyers until payment, and that by failure of payment the title to the property did not pass out of the plaintiffs or to any of the defendants.

The testimony of a number of witnesses for the plaintifs, dealers in grain, of large experience, was to the effect of a custom for the protection of the seller,

which may be stated as follows: The grain is taken to the warehouse with a sample-box containing seller's card; the weigh-master ascertains the quality, as compared with the sample furnished him for that purpose by the buyer, also the quantity or weight. The returns are then made out and sent with the warehouse receipt usually to the seller, who from them makes out the bill and account against the buyer, and upon settlement or payment transfers the returns and warehouse receipt to the buyer, and then the delivery becomes complete and title passes, and the buyer becomes the owner.

The custom would bind the parties to the transaction, or those who could be charged with knowledge thereof, but it is doubtful whether the custom is of such publicity or regularity as to charge the defendants Cammann & Morrison, who were not directly in that line of trade. In fact, it would seem that there is a duty incumbent on the warehouseman in making out or delivering the warehouse receipt. And one of the plaintiffs, Hazeltine, testifies: "The seller thinks the warehouseman must be sure that he gives proper receipt to the proper party; it is his business to see that he gives it to the owner." "It is the warehouseman's business to find out the seller, and one of the risks of his doing business." And further on he says, "he must pay the penalty of a mistake in making erroneous delivery of a warehouse receipt to buyer instead of seller."

And the query arises whether this does not indicate the plaintiff's proper remedy in this case.

Mr. Hazeltine further testifies, "that since this transaction, and to prevent repetition of anything similar, the plaintiffs have changed the form of their orders." That is, as I gather from other parts of the testimony, they now, on delivery, direct warehousemen to store it for their account.

The warehouse receipt was in the name of Akin &

Co., and its delivery to them was in the usual course of business, where no other person was known in the affair; and Baker, the warehouseman who makes this statement, also says, "we did not know the plaintiffs had any interest in the transaction. If I had known there was a sale of corn by Hoyt & Co., I should have sent them the returns as is usual."

It further appears, that in the year 1868, among some parties in the trade, the practice, as to what person should receive the returns from the warehouse, depended largely upon the character of the purchaser.

Mr. Lainbeer, a witness, says: "I have been in the storage business since the year 1845; I think the seller has a duty to perform in letting warehousemen know something about it."

To overcome plaintiffs' claim that Akin & Co. were not to have delivery or title before payment, and to show that the parties had dealt otherwise, proof was given by the defendants, Akin & Co., of five different transactions in grain between them and the plaintiffs. covering a period of six months immediately before the transaction in suit; and the plaintiff Hazeltine says, "in those cases we did not get the warehouse receipt or bills of lading." And it also appears that although plaintiffs had parted with the grain, and did not hold the "returns," so called, yet that payment was not made by Akin & Co. for a period varying from five to ten days afterward. The word "returns" as used here and by the witnesses, is understood to refer to weigher's certificates, warehouse receipts and bills of lading, all going together. On the part of Cammann & Morrison, it is claimed that their advances, being in good faith in the course of mercantile usage, without fraud or notice. and upon the faith of an instrument recognized by statute as a negotiable security, they are entitled to be protected, and the well-known rule in Lickbarrow v. Mason, 3 Term R., 63, applies; that "where one of

two innocent parties must suffer by the fraudulent practice of a third party, he who has put it in the power of the third party to commit the fraud must bear the loss." The rule is to be applied with care. Let us see what position the plaintiffs occupied after the contract of sale. They were instructed by Akin & Co. to deliver the grain at a certain warehouse, and they did so. The price and place of delivery were named, quantity and quality ascertained and grain stored for account of the buyers, and at their charge and expense, and a warehouse certificate issued in their name. Was it the duty of the warehouseman, who did not know the plaintiffs in the transaction, to do anything for their protection? Did they not owe a duty to the warehouseman if they wanted the warehouse certificate from him? In other words, taking the transaction and the testimony together, were not the plaintiffs extremely negligent?

But even if the warehouseman be chargeable with omission or mistake, that cannot work to the injury of a title acquired by an innocent party, in good faith, from one who had not only an interest in the property

but all the indicia of title.

Possession of the receipt, under such circumstances, was possession of the grain (4 Comst., 497, 507; Pars. Merc. L., 57-61; Brown v. Peabody, 13 N. Y. [3 Kern.], 121).

And a vendor, who parted with possession of grain, but retained the title, was held subordinate to a buyer in good faith (Rawls v. Deshler, 4 Abb. Ct. App. Dec.,

18; S. C., 3 Keyes, 575).

Suppose the grain were destroyed in the warehouse before plaintiffs had been paid for it, if they are right in their position, the loss would have fallen on them. A case in point on this head, charging the loss on the buyer, will be found in Russel v. Carrington, 44 N. Y., 375.

The case at bar is to be distinguished from some of the cases quoted by the plaintiffs' counsel.

In Basset v. Spofford, 45 N. Y., 392, the defendant received the property from a person who, on pretense of a purchase had obtained larcenous possession, and the court says: "Had the defendant received from him the bill of lading or receipt for the goods, and dealt with him on the faith of it, a different question might arise." In the case at bar, the possession of Akin & Co. was not in any sense larcenous, and they were dealt with by Cammann & Morrison on the faith of the receipt.

In Ballard v. Burgett, * 40 N. Y., 314, it was a part of the contract of sale that the vendor was to remain the owner of cattle until the vendee had paid for them.

In Spraight v. Hawley, † 39 N. Y., 448, it is said: "If the owner has done something calculated to mislead, on which a third party has a right to, and does, rely, the maxim in Lickbarrow v. Mason, would apply."

Among the requests to charge, the court refused the following: "That if plaintiffs, after the contract of sale to Akin & Co., put them in apparent possession of the corn, whereby they were enabled to obtain the warehouse receipt, and the defendants Cammann & Morrison, having advanced on that receipt in good faith, a verdict should be rendered in their favor." The defendant excepted to this refusal. There was enough testimony in the case, and some conflict as to facts, in the evidence given by buyer and seller, which make the request good.

The court ordered a verdict against Akin & Co., and the jury found against the other defendants for the value of the property.

^{*} Reported below in 47 Barb., 646.

[†] Reported below as Dudley v. Hawley, 40 Barb., 397.

The judgment should be set aside and a new trial ordered, costs to abide event.

BARNARD, J., concurs in the result, upon the ground of error, at the circuit, as matter of law, in the direction of the justice at the trial, in ordering verdict against Akin & Co.

Judgment accordingly.

HAZARD against ABEL.

Buffalo Superior Court; General Term, 1873.

BILL OF LADING.—ACTION FOR CONVERSION OF GRAIN

L., the shipper of grain, took for it a bill of lading expressing that the consignment was for account of L., care of N., at Buffalo, and drew a sight draft upon N. for a large sum, and on the draft and bill of lading he borrowed the money to pay for the grain. N., on presentation of the draft and bill, obtained a loan from the plaintiffs by pledging the bill of lading, indorsing it personally and as agent, and with the money thus borrowed he paid the draft. At the same time he signed, as agent, a receipt expressing that the money was an advance on the corn, and that the bill of lading was neld by plaintiffs as collateral. On the subsequent arrival of the vessel, the master, by N.'s direction, delivered the grain to the defendants as warehousemen, who thereupon issued a ticket acknowledging its receipt from the master of the vessel, and the master indorsed this receipt to the order of N. The defendants subsequently delivered all the corn pursuant to various orders drawn upon them by N. in favor of third persons. Held, that defendants, not having had notice of the advances made by plaintiffs, were not liable to plaintiffs for so delivering the grain.

Warehousemen who receive from a carrier a cargo of grain, issuing their receipt therefor to the carrier, which the carrier indorses to

the person named as consignee's agent in the bill of lading, are not liable in trover, to the consignee, or his pledgee of the bill of lading, for delivering the grain upon the order of such agent, and without notice of the pledge.*

George S. Hazard and Frank W. Fiske sued William H. Abel, as president of the Western Elevator Company, to recover damages for twenty-four thousand bushels of corn, alleged to have been converted by the defendant, an elevating company of Buffalo. The cause was tried by the court without a jury, May 7, 1873.

Upon the trial it appeared that on October 28, 1871, at Chicago, J. B. Lyon shipped the property upon the schooner Czar, bound for Buffalo, and bills of lading in the usual form were issued by the master, the consignment being made "acct. J. B. Lyon, care O. L. Nims, Buffalo." Before the arrival at Buffalo, J. B. Lyon drew his sight draft of October 28, at Chicago, upon O. L. Nims, Buffalo, for twelve thousand six hundred and ten dollars and fifty-nine cents, in favor of a bank, and upon that and the bill of lading the money was raised to pay for the corn. When the draft was presented at Buffalo on October 30, Nims negotiated an advance or loan of the plaintiffs' for twelve thousand six hundred dollars, thereby paying the draft, and delivered over to them the bill of lading which accompanied it, to be held as collateral, indorsing it personally and also as agent. At the same time, as "O. L. Nims, agt.," he executed and delivered to the plaintiffs a receipt, stating the receipt of the money as an advance on the corn, and that the bill of lading was held as collateral. The vessel arrived at Buffalo Nov. 8, and the master reported to O. L. Nims, by whose direction the corn was that day delivered to and received by the defendant in an elevator according to the usage at that port, Nims paying the freight and

^{*} Compare the last case.

charges. The defendant on that day issued a ticket acknowledging the receipt of the property from the vessel, which the master indorsed to the order of O. L. The corn was disposed of by Nims as follows: On November 10 he drew an order upon the elevator for delivery to J. M. Hutchinson of thirteen thousand three hundred and three bushels. The defendant issued a receipt for that amount from Nims for account of whom it may concern, subject to the order of Hutchinson, who on the same day indorsed the receipt, directing a delivery to O. L. Nims' agent on payment of all charges, and delivered the receipt so indorsed to Thereupon on November 10, 11, 12, five orders were drawn by "Nims and others, agents," upon the elevator for the delivery of the corn to canal boats, and it was all so delivered and shipped, upon which all connection of the defendant with the property ceased.

The receipts given by the defendant, and the orders upon it, were all according to the usual and uniform usage of the port, and the method of receiving, elevating, and shipping forward such cargoes by canal boat to a market.

It was admitted that neither the master of the vessel nor the defendant had notice of the facts relating to the advance by plaintiff, and that nothing occurred, as far as the defendant was concerned, until November 28, when the plaintiffs notified the defendant not to ship the corn. Nims failed on November 20, having disposed of the property without accounting to or paying the advance to the plaintiffs, who have instituted this action to recover the value of their special property.

It appeared, also, that before the date of Nims' failure, the plaintiffs took no steps to protect their interests, that they knew of the arrival of the corn on November 8, and asked Nims what he was going to do with it, and he informed them that he had new Toledo corn coming in which he should mix with the cargo of

the Czar and ship, and which was done by him, but nothing further occurred between them until the day of the failure, when the plaintiffs presented at Nims' office the account for the advances, interest, exchange and commission.

It also appeared that, during all the transactions, Nims was, in fact, the owner of the corn, and, on its arrival, took charge of it, and dealt with it as his own, and Lyon was merely his purchasing agent at Chicago.

John Ganson, for plaintiffs.

William H. Greene, for defendant.

Sheldon, J.—The bill of lading in this case consigned the property to the shipper, as consignee, to the care of a delivery agent at the port of destination. Had it been consigned to consignee or order, the duty of the carrier would have been to have delivered only to the consignee on production of the bill, or to the assignee holding and producing it duly indorsed (3 Kent Com., 289; The Thames, 14 Wall., 98, and cases cited).

But in this case, by common consent, not only the shipper, but all the indorsers or assignees of the bill of lading, constituted Nims their agent to receive and care for the property in the usual and ordinary course of business until his agency was properly revoked. Upon the face of the bill, being only such agent, he had no property in the corn, and could maintain no action against the master or carrier for not delivering, or for negligence (Abb. on Shipp., 411; Grove v. Brien, 8 How. U. S., 429). Nor could he, in any manner, pledge or convey title to the property, and his transfer of the bill of lading to the plaintiffs gave them no rights against the consignee or over the property. The bill itself notified them that he was a mere agent, dealing with the property of others, and that it was beyond the

ordinary business of a delivery agent to pledge the property of his principal (Duncan v. Jandon, 15 Wall., 165).

By a delivery to the agent, the ship fulfilled its engagement. It was right, in fact and in law, that the master report to Nims as the delivery agent, and take his directions as to unlading, and take the ticket evidencing the discharging of the cargo and deliver it to the delivery agent. The delivery to the defendant was done by the lawful order of the agent, and the issuing of the ticket and its transfer to Nims was but a discharge of the duty of the ship, and afforded evidence to him that the duty was performed, and that the corn was in the elevator, subject to his disposition as completely as it was when on shiphoard. Whatever the muster did was in the line of his duty and the usual and necessary course of business at the port of destination, and, if so, whatever the defendant did in the receiving was equally justifiable. In this view, then, the ship has fulfilled its engagement, and made delivery according to it without production of the bill of lading issued to the shipper, for it had, without notice of the rights of others, delivered to one who was the constituted agent of all to receive and care for the property at the port of destination.

The fact that appeared extrinsically, the bill of lading, that Nims in fact was the owner or the general owner of the property does not change or affect the rights of the carrier or of the defendant as far as above considered. If he dealt with it as owner, as he testifies, then he was entitled at least to receive the corn. That he had it on shipboard or in an elevator to his order made no difference, for it was in law continuously in his possession and under his control, and subject at all times to the plaintiff's rights, if asserted. The usual course of the business of which courts will take judicial notice is for the vessel immediately to discharge into

an elevator, without delay, and then for the property to be re-transferred to canal boats to be forwarded to the seaboard (Gibson v. Stevens, 8 How. U. S., 384).

The defendant, in receiving it from him, or delivering it to him, either controlling it as agent for all parties, or as owner, and allowed to control as such for all, acted merely as the necessary medium of transfer in the usual course, and according to the usage of the port. Nims had the control and disposition of it the whole time, subject merely to the usual charges of the defendant, and the ticket and receipt were but the evidence of those facts. He had the right to withdraw it from the defendant as he did, by the several orders issued, as all such transfers of actual possession are made, and by so withdrawing it he still held it in his possession subject to the title of the plaintiffs, if they had acquired any by the transfer to them of the bill of lading. As the agent or the owner he had the right to care for the property and to receive it from the defendant, and in doing this he did what any vendor, or mortgagor, or pledger does who is left by the vendee. the mortgagee, or the pledgee, in possession, and as to all others who had any interests therein it was his duty so to do and protect and care for the property. That he may have subsequently converted it or tortiously defeated the plaintiff's interest in it cannot lay the foundation of this claim against the defendant.

What is here in controversy is, whether upon the facts in this case the defendant has incurred any liability by receiving the corn and delivering it to the one from whom it was received. Had the plaintiffs notified it before delivery the case would be different, but a delivery without notice upon such facts could not be a conversion. It is not contended that the defendant acted tortiously, the only evidence of a conversion being the demand and refusal to deliver to plaintiffs long after the property had passed through defendant's

hands in the usual mode of transhipment at the port. The receipt and delivery by defendant, at the time, not being tortious, then there was no conversion at the time, and the subsequent refusal to deliver, on a day when compliance with the demand was impossible, is not sufficient to sustain this action (Hill v. Covill, 1 Comst., 524; and see also Carroll v. Mix, 51 Barb., 212).

It seems plain that the defendant incurred no liability upon the facts in this case. It was in possession of certain necessary facilities for the transfer of grain at the port of Buffalo from ships to canal boats, and it was its business so to do for all who sought to use their facilities. It receives a cargo of corn one day from the one who has control of it, and on the next day delivers it to the same person upon payment of the charges, and this, too, in the ordinary course of business, and as a necessary and usual part of the machinery whereby the inland commerce of the country is accommodated and transacted. The title or the evidences of title to the property are not considered in the transaction. It is sufficient that the property is restored to the one of whom it is received, or to his order.

The transaction is a mere transhipment, imposing no duty upon the defendant except the ordinary duty of a bailee to restore the property safely to the bailor when no intervening rights of others have been asserted. (Story on Bail., § 450, 582; 7 Bing., 339). If any other rule is to be applied to the transfer of cargoes at the port of Buffalo it would manifestly embarrass if not prevent the ordinary transaction of commercial business.

Upon these considerations the defendant is not guilty of the alleged conversion, and I have desired so to determine this case that the judgment may be applicable to the similarly daily recurring instances of the receipt

and transfer of cargoes at commercial centers in the ordinary and well-established course of business.

The case, however, presents other facts which pre-

vent a recovery by the plaintiffs.

It certainly appears that Nims acted not only as delivery agent and as owner in controlling the property. and this, too, for the benefit of all concerned, but the plaintiffs expressly allowed and expected him so to do and to ship the property after it had passed through the hands of the defendant. He informed them after the cargo arrived that he should mix it as he did and ship it, which meant to ship it forward by boats to the wellknown and usual market. The plaintiffs are chargeable with notice that in order to accomplish this it was necessary to pass the corn through an elevator and thence to discharge it into boats, upon which it then became shipped forward to the seaboard. This was done by Nims, as was permitted and expected. It would seem that the plaintiffs relied upon his integrity in the whole matter, unreservedly entrusting him with the duty and business of shipping and disposing of the property, and had he repaid their advances and charges as expected, no claim against any one would be asserted or pretended. This appears to be manifest from the facts that they gave no notice of their rights to the master or the defendant, and took no steps to assert them until November 20, when Nims failed and the property was in the hands of purchasers who, upon the above facts, having bought it of one expressly authorized to ship and sell, would hold it against the plaintiffs. Whatever derelictions of duty may be charged to the plaintiffs' agent in this matter, the defendant is innocent upon the principles above stated, and still more clearly so upon the facts of the whole transaction between the plaintiffs and their agent.

The complaint is dismissed, with costs.

CHAPMAN against DOUGLAS.

New York Common Pleas; General Term, May, 1874.

PLEADING.—DEFECT OF PARTIES.—EXECUTION.—
WRONGFUL LEVY.—SALE OF SAFE AND
CONTENTS.—LIABILITY OF
INDEMNITORS.

Where a defendant, sued for a wrongful levy, answers justifying under process against a corporation to whom he alleges the property levied on belonged, plaintiff may prove in avoidance, that before the levy the property of the corporation had been vested in a receiver.

A sheriff levied process on a safe which did not belong to the judgment debtor, and in which was locked up merchandise belonging to still another person, the present plaintiff. The sheriff removed the safe and contents to an auction room, unpacked the merchandise and deposited it, marked with his name upon it, with the auctioneer, and sold the safe on the execution.

Held, that the seizure of the safe being wrongful, that of the contents was so, also; but the obligors in the indemnity bond given to the sheriff were not liable in respect of the contents, without proof that they had knowledge thereof.

George M. Chapman sued Alexander Douglas, Joseph B. Taylor and Alexander Matthews, in the New York common pleas, to recover the value of a safe and its contents, taken from the possession of the plaintiff in November, 1866, by the sheriff under an attachment issued in an action brought by the defendant, Douglas, against the New York Silk Manufacturing Company. The attachment was issued on the ground that said company was disposing of or secreting its property with intent to defraud said Douglas.

In December, 1866, judgment was entered against said company in favor of the defendant Douglas, an execution issued thereon, under which the sheriff forcibly took from the plaintiff's possession said safe, and also its contents, being a large quantity of valuable silk owned by the plaintiff.

The safe was taken from plaintiff's premises, on Thirty-third-street, to the factory of R. M. Patrick, 62 Cannon-street, and there opened on January 9, 1867, and the contents taken thence to Walters' auction store. No offer was ever made to return the silk to the

plaintiff.

The sheriff informed the defendant, Douglas, that plaintiff claimed the safe, and demanded that Douglas should give an indemnity bond which was thereupon given, executed by all of the defendants, before the sheriff made a levy under the attachment.

On the trial the defendants introduced evidence tending to show that the New York Silk Manufacturing Company owned said safe in January, 1866, and that the alleged purchase by plaintiff, was unauthorized by the company, and void under several statutory provisions.

The plaintiff put in evidence a decree of the supreme court, dated April 17, 1866, in an action against said company by a judgment creditor, appointing a receiver of all the stock, property, things in action, claims, &c., with all the powers and authority conferred on receivers, as provided in art. 3, tit. 4, ch. 8, part 3, of the Revised Statutes; 2 Rev. Stat., 469, §§ 67, 68.

William W. Chipman was appointed such receiver, and his appointment was perfected by filing a receiver's bond, April 24, 1866.

At the close of the testimony the court held that the receiver was the only person who could contest the plaintiff's title to the safe, and the jury rendered a verdict for the plaintiff for the value of the safe, five

hundred and sixty-eight dollars, and of the silk, three thousand five hundred and sixty-seven dollars and four cents.

Richard C. Elliott, for the appellants.

Erastus New, for the respondent,—Cited as to the main question: Boyce v. Brockway, 31 N. Y., 490; Herring v. Hoppock, 15 Id., 409; Ball v. Loomis, 29 Id., 413; Davis v. Newkirk, 5 Den., 92.

Daly, Ch. J.—The defendants, to justify the taking of the property, averred that at the time of the levy, it was the property of the New York Silk Manufacturing Company; or that they had an interest in it which was liable to levy and sale under the attachment and execution. Their whole defense rested upon this averment; for if it were not the property of the corporation at the time of the levy, or if they had not in it then any interest which could be attached, or levied upon, the sheriff had no right to take it under an attachment and execution against that company.

Everything set up in the answer to justify the taking, was impliedly denied; and, it being incumbent upon the defendants to establish the ownership or interest of the company in the property levied upon, it was undoubtedly competent for the plaintiff, upon that issue, to show that before the levy had been made, a receiver of the corporation had been appointed, and that all the right and title which it had in its property and effects, was at the time of the levy vested in him.

The cases of Savage v. Corn E. & F., &c., Co., 4 Bosw. 15, and Brett v. First Universalist Society of Brooklyn, 63 Barb., 610, which the appellants rely upon, have no application to this case.

They merely hold that a defendant cannot avail himself of a defect of parties, or of title in a third per-

son, unless he has set it up in the answer by way of defense, which is a very different case from this.

The appointment of a receiver of the company's effects having been shown, and the fact being undisputed, it was a complete answer to the defendants' rights to have the safe levied upon and sold to satisfy the execution which they had against the company.

If, as the defendants insist, the safe was illegally or fraudulently transferred to the plaintiff, the receiver, who then represented both the corporation and its creditors, could alone maintain an action, or take any proceeding to recover it, he being vested by the law with the sole and full authority to do so (Tallmadge v. Pell, 6 N. Y. [3 Seld.], 328).

The only question, then, that remains is, whether the defendants are answerable for the taking of the contents of the safe.

There would be no doubt of the sheriff's liability. If he had no right to take the safe, and could not take it, as it was locked, without taking the contents, he would be answerable for the act.

The safe was in the plaintiff's possession, upon his premises. The plaintiff had filled it with silk, and had locked it. He was under no obligation to unlock it, and take out the silk, to enable the sheriff to do what he had no authority to do—take it out of the plaintiff's possession, and sell it to catisfy the execution upon the defendants' judgment.

If the sheriff had had the right to levy upon the safe, and, to enable him to take it, had requested the plaintiff to unlock the safe and remove the contents, and the plaintiff would not, a very different question might have arisen; or if the sheriff, after taking away the safe and opening it, had brought back to the plaintiff the contents, the plaintiff would have been bound to have accepted the silk, and its return would have gone so far in the reduction of the damages.

He did not, however, do this. He testified that he notified the plaintiff to be present at the opening of the safe; whilst the plaintiff testified that he never received any such notice,—that the sheriff never offered to return the silk to him, nor did any one upon the sheriff's behalf; that he, the plaintiff, never received any intimation from any person as to where the silk was after it was taken away with the safe, and never knew, until apprized of it upon the first trial of this cause.

After the safe was opened, the sheriff took out the silk, and took it to an auctioneer's, where he had it packed in a box, which was nailed up, the sheriff putting his name upon it, and the box, at the time of this trial, had remained at the auctioneer's for nearly

six years.

A plaintiff may not unnecessarily enhance his own damage or loss so as to make the responsibility of one who wrongfully takes property, under the supposition that he has a right to it, greater than it would otherwise be. There was an attempt to show something of this kind by proving the declaration of one of the plaintiff's employees named Pritchard, to the effect that they gathered up everything that was in the place, and put it in the safe, when the plaintiff locked it up, and, putting the key in his pocket, said, "Now let him (the sheriff) touch it, and I will make him sweat for it." But Pritchard was examined as a witness, and testified that the plaintiff simply told him to put the silk in the safe, to lock it up, to see that the doors of the factory were safe, and have a care, saying, "And if they touch the safe, I will make him (the sheriff) sweat for it," which puts a very different coloring upon the matter, it being in evidence that the use previously made of the safe by the company was to put away silk in it, and that the plaintiff used it for that purpose before the levy. His testimony was "We kept such articles (silk in boxes and in spools) in the safe," and

that, after he bought the safe, the silk was put in it and locked up every night.

But, though it is very clear that the sheriff would be responsible for taking both the safe and its contents, the question arises whether the defendants, who simply signed a bond of indemnity, are answerable for the sheriff's taking away the plaintiff's property in the safe.

All that the sheriff assumed to levy upon was the safe, which had belonged to the defendants in the execution, but there was no pretense that the contents of the safe belonged to them.

The sheriff was apprised that the property in it was the plaintiff's property, but he took it because he could not take the safe, it being locked, without also taking the contents. Were the indemnitors answerable for this?

It was held in Davis v. Newkirk, 5 Den., 95, that the indemnitors were liable for the sheriff's levying upon and selling a certain quantity of lumber, for the reason that the bond contemplated such a seizure and sale; the engagement in the bond being to save the sheriff harmless for levying upon and selling the lumber under the execution.

This, it was held, was a virtual request to the sheriff to proceed and do what he did. It was regarded as an act done under the direction and with the advice and concurrence of the indemnitors, for which they were as much responsible as the sheriff. "All," says Beardsley, Ch. J., by whom the opinion of the court was delivered, "who direct, request, or advise, an act to be done which is wrongful, are themselves wrongdoers, and responsible for all damages." This, it was said in Ford v. Williams, 13 N. Y., 584, 585, was carrying the rule of the liability of those who aid and abet in the commission of a trespass, far enough."

"I do not affirm," said DENIO, Ch. J., "that

that case (Davis v. Newkirk) was incorrectly decided, for there was force in saying that all the obligors in the bond might be held to have requested the seizure." They certainly did so, for, before the sale, they gave the sheriff a bond, by which they engaged to save him harmless for levying upon and selling the lumber which he afterwards sold upon the execution, in addition to which there was some evidence tending to connect the indemnitors with the sheriff in taking away the lumber.

The bond given by the defendants in the present case, after reciting that certain personal property that appears to belong to the New York Silk Manufacturing Company, is claimed by other parties, engages to save the sheriff harmless for levying, attaching and selling under and by virtue of the attachment, or of any execution which may be issued in the action, all or any personal property which he or they shall or may judge to belong to the debtor, as well as for entering upon premises for the taking of any such property. The seizure which is here contemplated, and for which they engage to be responsible, is of property which he or they shall or may judge to belong to the New York Silk Manufacturing Company, and it was the safe, and not its contents, that the sheriff levied upon and sold as the property of that company. If the defendants knew that the safe could not be taken by the sheriff without his taking the contents of it, also, and they had, with that knowledge, directed him to take it, they would undoubtedly have been liable. But there is nothing in the bond, or in the evidence, from which it can be inferred that they contemplated, meant, or directed, that the contents should be taken if the safe could not be taken without doing so. The value of the safe, as found by the jury, was only four hundred dollars, whilst the value of the silk contained in it was two thousand five hundred and twelve dollars, which, with interest, amounted, at the time of the trial, to

three thousand five hundred and sixty-seven dollars and four cents. In other words, what was contained in the safe was worth six times as much as the safe itself, and, before the defendant could be held answerable for this large amount of property, there should, in my opinion, be some evidence to show that they knew, before they gave the bond of indemnity, or before the safe was taken, that it was locked, that the plaintiff had the key of it, and would not open it, so as to show that they were apprized that it could not be taken away and sold without also taking whatever was in it.

All that there is in the case is the bond of indemnity and that the sheriff told Mr. Douglas, one of the defendants and indemnitors, that the plaintiff claimed the safe and demanded a bond of indemnity, which was given, and that some months before the trial-that is, several years after the taking—the box was examined at the auctioneer's, at the instance of Douglas, to ascertain the value of the silk contained in it. For all, therefore, that appears in the case, it may have been that Douglas and his co-obligors would not have been willing, if they had known that the safe was locked, to authorize the sheriff to take it at the hazard of being answerable for whatever was contained in it. plaintiffs in an execution are not answerable for all that a sheriff may do under it, nor are those who indemnify the sheriff.

They are responsible only so far as they may have directed or assented to the doing of the act complained of (Averill v. Williams, 1 Denio, 501; 4 Id., 295), e. g., as in Allen v. Crary, 10 Wend., 349, where the plaintiff in the execution pointed out the property to the sheriff, and directed him to levy upon it; or, in Stewart v. Welis, 6 Barb., 79, where the plaintiff, after the sheriff had levied upon property, said that the sheriff was going to sell it, and that he (plaintiff) had directed

the levy to be made; or Fonda v. Van Horne, 15 Wend., 631, where the plaintiff directed the sheriff to levy on two cows and a calf, and told him that he would indemnify him; or in Herring v. Hoppock, 20 N. Y., 413, where the sheriff, having levied upon a safe which was claimed by a third party, refused to sell it unless he was indemnified, -in which case the indemnification was regarded as a ratification of the levy and the cause of the sale; for the bond referred to the property which had been levied upon and claimed—the safe—and, therefore, the giving of the bond was regarded as a virtual request to the sheriff to go and sell the safe:—or in Ball v. Loomis, 29 N. Y., 412, where the plaintiff directed the taking and the sale, and indemnified the sheriff, which, I believe, embraces nearly, if not all, the cases in which this question has arisen in this State.*

This objection was distinctly raised at the trial. The defendants, at the close of the case, insisted that it had not been shown that the defendants requested the sheriff to levy or remove the property in the safe; that the issuing of the execution was not such a request, nor the giving of the bond of indemnity, which only undertook to save the sheriff harmless for taking or removing what might appear to be the property of the company, and that the property in the safe did not appear to be, nor did the defendants claim it to be the property of the company; that the defendants were not responsible for the goods unless they requested the sheriff to levy upon, remove or meddle with them, or requested him to remove the safe with the knowledge that it contained the goods, and that there was no evidence of any such request.

They asked that the jury should be so instructed, and as, in my opinion, there was nothing in the case

^{*} See also Murray v. Binninger, 3 Abb. Ct. App. Dec., 336, and cases in note.

from which it can be inferred that the defendants contemplated, meant or directed the sheriff to take the safe, no matter what might be in it, if he could not take it otherwise, I think they were entitled to the instruction asked, and that there should be a new trial, unless the plaintiff consents to reduce the verdict to the value of the safe and interest.

LARREMORE and J. F. DALY, JJ., concurred.

Judgment accordingly.

THE PEOPLE ex rel. WALTERS against CONNER.

Supreme Court, First District; Special Term and Chambers, May, 1874.

CONTEMPT.—JURISDICTION OF MARINE COURT.—COM-MITMENT.—HABEAS CORPUS.—MOTION PAPERS.

A commitment for contempt in not delivering possession of property pursuant to order of court, must show on its face that the person committed had possession or control of the property.

On habeas corpus to discharge the prisoner from detention under a commitment which is defective in this respect, the court can not supply the defect by resorting to the papers on which the original order to give possession was made.

On execution from the N. Y. marine court, a marshal took chattels, one of which his men pawned, and the auctioneer, employed by the marshal, redeemed it, and refused to deliver it without being reimbursed. Held, that the marine court had not power to determine the right to possession on summary application without action.

After a commitment has been adjudged void, on habeas corpus, the papers on which it was granted are functus officio; and a new motion should be made if a new commitment is sought.

Habeas corpus.

In the case of Lawton v. Wells, in the marine court, judgment for plaintiff was entered by default, and execution issued to Marshal Toplanyi, who levied upon chattels of the defendant, the judgment debtor, part of which were deposited with Richard Walters, auctioneer. The other part, consisting of a watch and chain, were pawned by an employee of Toplanyi, and subsequently redeemed by said Walters. The judgment and execution were set aside, by a consent of the attorneys, and an order of the court entered thereon.

By order of said court, dated March 21, 1874, it was directed that "Marshal Toplanyi and all persons holding for him or having in possession the goods and property by him taken . . . respectively deliver up the said goods and property to the defendant on demand."

These orders were served on Richard and Charles Walters, who delivered up all the chattels except the watch and chain, upon which they claimed a lien for moneys paid in taking them out of pawn. On orders to show cause why said Richard and Charles Walters should not be punished for contempt in refusing to return the goods and chattels, an order was made on April 15, 1874, notwithstanding the motion was resisted on the ground of said lien, adjudging both Charles and Richard Walters guilty of contempt, and ordering that each pay to the clerk of the court a fine of one hundred dollars for the use of defendant, and fifty dollars costs to his attorney, and that they be imprisoned until they and each of them pay the said fines and costs, and until they restore and deliver to said defendant the goods and property referred to in the order of March 21, 1874, and that a commitment should issue to carry that adjudication into effect.

A commitment was thereupon issued, under which

the relators were taken into custody. They were discharged on habeas corpus, the court holding that the commitment was defective on its face, among other things, in not stating definitely the property to be returned.

A second commitment which attempted to cure these defects, was thereupon issued out of the marine court, and the relators were again taken into custody.

A second writ of habeas corpus was then sued out.

Ambrose Monell and Lewis Johnston, for the relators:—I. It does not appear that the relators or either of them have or had the watch and chain in possession or control; nor that the possession is or was joint.

II. The punishment inflicted is joint, and neither relator can be discharged until a compliance by both

with the terms of the commitment.

III. The offense charged in the commitment did not constitute a contempt within the meaning of the statute.

IV. The court had no jurisdiction to punish the relators for the offense charged.

Wm. M. Gallaher, for party in interest, and Henry W. Bookstaver, for the sheriff. The marine court had jurisdiction, and it having decided that a contempt had been committed, this court could not go behind the return and try that question over again.

Donoiue. J.—In this case the relators are before this court on habeas corpus, &c. The return and proceedings under it show these facts; that in an action, wherein one Lawton was plaintiff and one Wells defendant, pending in the marine court, that court made an order that a person not now before the court, and all persons holding for him, deliver up certain property to the defendant in the suit named, among other things a watch; it is further alleged that the order was served on the relators, and they refused to give up the watch,

and the court thereupon adjudged Walters et al. in contempt, and imposed a fine, &c., on them. These parties have been before the court before, in this matter. on a commitment which has been held bad, on which occasion the court infimated to the respondent's counsel that the writ was in addition bad, in failing to show such a state of facts as gave the marine court jurisdiction of the persons of the relators; and the case comes back here with this same defect. Now that this case may at least be put on grounds that the respondent may review, and the case not left to come here again, I hold that the commitment nowhere alleges that the relators had possession of the watch or were in a position to deliver it. The respondent attempts to get over this by going back of the return, and referring to the papers used on the motion, ending in the order of com-It is only necessary to say that the writ must show a valid cause of commitment on its face, and this court can not go behind to sustain or discharge it. On its face it appears that the court issued a writ to some person named, and all others holding for him and them, and, without finding or holding that the relators held for the named person, or held at all, proceeded to commit them. What power the court had to order the persons named to deliver, if they had the watch, does not appear in the commitment, nor is it alleged therein; but beyond this, had the relators been named and then possession found, I find no law to sustain the commitment. I can not conceive what right the marine court has in a suit between A, and B., to ask C, to deliver what he has received from D. Had it the power to issue injunctions and appoint receivers, the extent of power here exercised would, in my judgment, be excessive.

So much for the case as it appears on the writ. If the respondent is permitted to go behind it, then the facts appear that on execution from the marine court,

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Farmers' and Mechanics' National Bank v. Crane.

a marshal took the watch, and his men pawned it, the relators redeemed it, and held it for what they paid; these facts may present merits in a suit between the owner and the holders of the watch, but that is for a jury to pass on, and not for the court to determine, on motion in a cause between these parties.

On the commitment I find no contempt charged; and on the facts attempted to be put in to sustain it, no jurisdiction to determine the relators in contempt.

In addition, I do not think the use of the old motion papers to make a new order and commitment justified; they had done their work, and a new motion should have been made.

Relators discharged.

THE FARMERS' AND MECHANICS' NATIONAL BANK against CRANE.

New York Supreme Court, First District; Special Term, November, 1873.

EXECUTION. - AMENDMENT.

Execution must in all respects follow the judgment, be warranted by it, and strictly pursue it.

If the judgment be against two, execution against the person of one alone can not be issued, even after the other has been discharged.

An exoneration of one must be by indorsing a direction to the sheriff.

The plaintiffs, the Farmers' and Mechanics' National Bank of Philadelphia, sued Walworth D. Crane and Joseph C. Danckelman, copartners, to recover the amount of an over-draft; and in the complaint alleged Farmers' and Mechanics' National Bank v. Crane.

fraud. Judgment was obtained against both defendants. Separate executions were issued against the person of each defendant. The plaintiffs neglected to charge the defendant, Danckelman, in execution, and he was discharged by an order of supersedeas. The defendant, Crane, now moved to have the execution against him set aside.

Bushnell & Albright, attorneys for defendant Crane, and Samuel Jones, of counsel,—Cited 6 T. R., 525; Gra. Pr., 357; 2 Stra., 1218; Gra. Pr., 411; 5 Duer, 682.

Sanford, Woodruff & Robinson, attorneys for plaintiffs, and Edmund R. Robinson, of counsel,—Cited Fake v. Edgerton, 5 Duer, 681, and asked to be allowed to amend execution by indorsement directing the sheriff to apprehend one defendant only.

Fancher, J.—It is a well settled principle of practice that an execution, being founded on the judgment, must in all respects follow it, and be warranted by it. It has been held that it must be in the name of all the plaintiffs against all the defendants (6 T. R., 525; Gra. Pr., 357; 2 Stra., 1218), and that it must strictly pursue the judgment (Gra. Pr., 411).

The case cited from Term reports is authority for holding that if a separate execution against the body of the defendant is issued upon a joint judgment against two defendants, the execution will be set aside, and the defendant arrested under it will be discharged.

If the plaintiffs wish to exonerate one of several defendants from arrest on an execution, they can not do so by an irregular execution, but must indorse upon it a direction to the sheriff (5 Duer, 682).

As to the amendment suggested, I do not think it can properly be made on this motion.

If the plaintiffs desire to amend, they should move for that purpose, on a notice to the defendants, who perhaps may wish to be heard on the effect of the former arrest of the defendant, the discharge of one of them, and the subsequent arrest of the other on a several execution.

The motion should be granted.

LIVERMORE against BAINBRIDGE.

*. Court of Appeals, 1874.

APPEALABLE ORDER.—DISCRETION.

The general term may review, by appeal, an order of the special term, made on a summary application, in an action, after judgment and affecting a substantial right, although upon a question of discretion.

But an appeal to the Court of Appeals does not lie from the general term in such a case.

Setting aside a report, for misconduct of a referee, is an exercise of discretion, within this rule.

The case of Howell v. Mills, 53 N. Y., 322,—distinguished.

This was an appeal from an order vacating judgment on a referee's report, and setting the report aside.

The facts are fully stated in our report of the order from which the appeal was taken, in 14 Abb. Pr., N. S., 227.

Andrews, J.—In the case of Gray v. Fiske, recently decided in this court, 53 N. Y., 630, in which an appeal was taken from the order of the general term of the superior court, affirming an order of the special term, denying a motion to set aside a judgment entered on the report

of a referee upon allegations of misconduct on his part, the appeal was dismissed on the ground that the motion was one addressed to the discretion of the judge at special term, and that no appeal in such a case lies to this court from the order of the general term, reviewing the exercise of that discretion.

The right of the general term to review an order of a special term made upon a summary application in an action after judgment, when it affects a substantial right, is given by section 349 of the code; and the jurisdiction of the general term under this section, to review orders made by the special term in respect to matters resting in the discretion of the court which involve substantial rights and interests, has been constantly exercised, and has been sanctioned and approved by this court (People v. N. Y. Central R. R. Co., 29 N. Y., 418). This jurisdiction is convenient, and is indeed essential to the proper administration of justice. The orders which come under the designation of discretionary orders frequently involve important rights, and the order in this case is one of that character. The effect of the order is to deprive the defendant of a judgment in his favor, obtained after a trial before the referee upon controverted questions of fact, and he is remitted to a new trial, with the hazard of a less favorable result. It would be unsafe and dangerous to conclude litigants in such a case, by the order of the special term, without the power to apply to an appellate tribunal to correct any error or inadvertence into which the judge at special term may have fallen in the exercise of the discretion.

But this court has steadily disclaimed the right to review, by appeal, an order of a special term, in matters resting in discretion. The rights of parties in orders of that character are not defined and established by fixed legal principles, nor by settled rules of equity. Each case must depend in a great measure upon its own pe-

culiar circumstances, and this court declines to entertain jurisdiction to review discretionary orders, as inconsistent with the constitution of the court and its character as a tribunal in which questions of law only are to be considered, save in the excepted cases within which orders of this kind are not embraced (Howell v. Mills, 53 N. Y., 322). In the last named case this court entertained an appeal for an order of the general term. affirming an order of the special term, denying a resale in a partition case, on the application of an infant who had been defrauded of his interest in the premises to which the proceedings related, by a collusive arrangement between the other parties at the sale. application to the special term was not in a just or proper sense addressed to the discretion of the court. The infant, upon the facts shown, was entitled by well settled rules of law to the relief asked, and upon this ground the court reversed the order appealed from. This decision does not disturb the general rule that an appeal does not lie to this court from discretionary orders. The appeal here is from the order of the general term, affirming an order of the special term, setting aside the judgment entered on the report of a referee for his alleged misconduct, and granting a new trial.

We are of opinion that Gray v. Fiske is a decisive authority against the right of the appellant to maintain this appeal. The supervisory power of the supreme court over the conduct of referees, and its jurisdiction to set aside judgments for misconduct on their part during progress of the cause, was distinctly asserted in that case, and the court declared that the same rules should be applied as were adopted by courts in applications to set aside a verdict for the misconduct of jurors. This view has been taken by the supreme court in several cases (4 How. Pr., 253; 9 Id., 1, 7; 12 Id., 297). It is strenuously insisted by the counsel for the

appellant, that no misconduct on the part of the referee was disclosed in the motion papers on which the order of the special term was granted, and we have not been able to discover anything in his conduct inconsistent with fairness or integrity, or which under the circumstances calls for criticism. Both the special and general terms exonerate the referee from any imputation of improper motives, in endeavoring, as he did, to bring about a settlement, and suggesting, as reasons for it, the same considerations which had been openly and freely spoken of between the parties or their attorneys. in the presence of the referee; and the order was granted by the special term, and affirmed by the general term, upon the ground that the referee may, though unconsciously, have been influenced in his subsequent actions by the fact that his suggestions as to the settlement had been disregarded by the plaintiffs.

It does not aid the appellant to show that the order was not justified by the facts upon which it was based, or that the discretion of the court, below in the particular case, was improvidently exercised. It is not sufficient to show that injustice has been done, but it must appear that it was done under circumstances which authorize this court to interfere.

The affidavits brought to the attention of the court a circumstance upon which the claim of misconduct was made. The judge at special term was called upon to decide in respect to it. From the nature of the case, what is misconduct on the part of the jury or referee, and what facts establish it, are inquiries which can not ordinarily be determined by the application of exact rules of law, and the decision must be left mainly to the good sense and sound judgment of the judge, before whom the inquiry is originally prosecuted. Different minds may reach different conclusions upon the same facts, and it is not to be supposed that a judge under the guise of discretion will seek to do injustice.

If the judge in the first instance decides wrongly, the general term can correct him. But there the right of review ends. This court possesses prescribed and limited powers, and its jurisdiction does not extend to review orders resting in discretion. The appeal should be dismissed.

All the judges concurred.

Appeal dismissed with costs.

ELSWORTH against MULDOON.

Supreme Court, First District, Special Term, 1873.

REDEMPTION OF LAND FROM SALE UNDER EXECUTION.

The fact that a debtor has, by compulsion of the court, in a suit in the nature of a creditor's bill, assigned to a receiver all his real estate, does not deprive him of the power to redeem such real estate from a sale on execution against him.

The right of the debtor to redeem is independent of whether he re-

tains any interest in the land.

The receipt or certificate of the sheriff who made the sale is sufficient evidence of the payment of the redemption money, and establishes the complete redemption of the property from the sale under the execution.

Such certificate need not be acknowledged or filed.

A memorandum made upon such receipt, by an attorney since deceased, that he made the payment and took the receipt for the debtor, naming him, is also admissible to prove the redemption.

Henry Elsworth took these proceedings against Kieren Muldoon, under 2 R. S., 312, to determine conflicting claims to the title to lands in the city of New York. The case depended on the facts stated in the

report of Livingstone v. Arnoux, at p. 158 of this volume.

Mr. Parsons, for plaintiff.

Isaac L. Egbert, for defendant.

Fancher, J.—The plaintiff has shown sufficient actual possession to enable him to prosecute this proceeding to determine the claim of the defendant to the premises in question. The principal inquiries are, 1st. Whether Francis Price, the original owner, could, at the time it was attempted, redeem the premises from the execution sale thereof; and, 2nd. Whether he did effectuate such redemption. If these inquiries are answered in the affirmative, the asserted claim of the defendant to the premises is expunged by the superior title of the plaintiff.

Lands were formerly sold under execution in the same manner as personal property; and, until 1820, the rule in New York was, to sell under execution the real estate absolutely at auction, upon due notice, without appraisement, and without any subsequent right of redemption. The sheriff thereupon executed a deed to the purchaser, which vested the defendant's title in the purchaser from the time of the sale. It was found that sales of real estate on execution had been attended with much oppressive speculation upon the necessities of the debtor; and therefore the legislature of this state provided by statute an effectual relief from the peremptory and sweeping desolation of an execution sale.

The Revised Statutes contain the following language:

"Such redemption may be made,

"1. By the person against whom the execution was issued, and whose right and title were sold in pursuance thereof: or,

"2. If such person be dead, by his devisee of the premises sold, if the same shall have been devised; and if the same shall not have been devised, by the heirs of such person: or,

"3. By any grantee of such person, who shall have acquired an absolute title by deed, sale under mortgage, or under an execution, or any other means, to the premises sold, or to any lot, tract, parcel or portion, which shall have been separately sold" (2 R. S.,

370, § 46; Edmonds' St., 384).

The dawn of this benign provision for redemption first appeared in the enactment of April 12, 1820 (Laws of 1820, 167, ch. 184, § 3). It was passed to repress a mischief against which the law did not provide; and, according to true interpretation, it must be treated as a remedial or beneficial statute, and be so read as to cure the former defect in the law, and to advance the remedy intended. If the directions of the statute be complied with, the relief provided by it is secured. It is only necessary, in this case, to give to the statute the natural and obvious sense which its language imports, without resorting to any subtle or forced construction, either to limit or extend its operation, and it will be plain that the statute conferred on Francis Price the right to make the redemption of the premises in question from the sale under the execution issued against him. It is conceded that the redemption was in due time; that he was "the person against whom the execution was issued, and whose right and title were sold in pursuance thereof." He was, therefore, the very person on whom the right of redemption was conferred by the express language of the first subdivision of the statute; yet it is argued that, by reason of his conveyance to a receiver, he was excluded from all redemption interest in the land, and could not, by his redemption, extricate it from the execution sale. The argument against the right of redemption imports,

into the statute, language which is not to be found there; and were the statutory right of redemption fettered by such a restriction, doubtless its removal would, long ago, have been effected by the legislature.

The statute does not say that the person against whom the execution was issued may redeem his lands from an execution sale, provided the title by grant of the lands otherwise remains in him. On the contrary, it gives the right of redemption to the execution debtor. irrespective of the situation of the title. Suppose a sale of land is made, on an execution, for one hundred dollars, and that the owner the next day should sell the land for one hundred thousand dollars, and execute a deed with full covenants to the grantee, from whom he should, at the same time, receive the full consideration. While the grantee might redeem the land from the execution sale, it would not be his duty, and perhaps not his inclination to do so. It would be the duty of the grantor to make the redemption, and his interest would require it to be done, so that he might avoid liability on his covenants. Should he attempt to make the redemption, is it possible he could be successfully thwarted in the attempt, by the pretense that "the right of redemption is such a right in rem that it can not be exercised except by one having, at the time, the legal estate in the premises?" Does not the statute expressly give the right of redemption to "the person against whom the execution was issued, and whose right and title were sold in pursuance thereof?" Must he be deprived of the benefit of redemption and subjected to an action on his covenant of title, because of the vague notion that the redemption is a right in rem beyond his reach? A sale of land, under an execution, is not conclusive before the expiration of one year from the sale (2 R. S., 370, § 45). During that time, the debtor, his devisees or heirs, or his grantees. may redeem. Nor can the deed be given by the sheriff

until three additional months have elapsed, during which other judgment creditors and mortgagees may, in the manner provided by statute, acquire the interest of the purchaser at the sale.

In Chautauqua County Bank v. Risley (19 N. Y., 373), it was held that a debtor's conveyance of his real estate to a receiver, although it may be compulsory, is, in its nature, simply and purely the creation of a trust for the payment of the debts on which the proceedings in equity are founded. The receiver is the trustee, and discharges his duty under the direction of the court. To hold otherwise would be to convert the creditor's suit into a species of execution on the judgment, for the specific performance of the lien, so that a title confessedly based on the debtor's involuntary conveyance to an officer of the court may relate back to the time when the judgment became a lien. For this conclusion there is no principle or precedent.*

The question in Husted v. Dakin (17 Abb. Pr., 137) was, who was entitled to certain surplus moneys arising on a sale under foreclosure. The referee awarded the surplus moneys to Husted, who had foreclosed the interest of Dakin in the mortgaged premises at an execution sale. Dakin, the judgment debtor, had attempted a redemption by tendering to the sheriff the requisite amount to redeem. The court, at general term, appears to have held that Dakin's efforts to redeem were ineffectual. But I think the reasoning of the judge who delivered the opinion in that case totally ignores the express language of the statute touching the right of the judgment debtor to redeem; and that the decision there made is without any sound principle or any adjudged case to support it. The learned judge cites, as an authority, Shepard v. O'Neil (4 Barb.,

^{*} Otherwise as to personal property, Clark v. Brockway, 1 Abb. Ct. App., Dec. 351, and cases cited.

126), a reference to which, and to the cases there mentioned, will show that the principle of the authority referred to was misapprehended when the citation was made.

HAND, J., in Shepard v. O'Neil, said, "I believe it is well settled that, by a sale of land on a judgment, the lien of the judgment and the right to redeem are gone." Several authorities are cited for this obvious proposition.* But the principle of that authority, that the lien of a judgment is lost when a sale under execution takes place, and that the right to redeem is also gone, is this, that a judgment creditor loses his lien and his right to redeem, when such a sale by virtue of the judgment takes place. It is not a loss of any right to redeem by the judgment debtor. The authorities cited in the case last referred to are authorities for some familiar propositions, e. g., that a debt is merged in the judgment; that a sale of land under execution extinguishes the lien of the judgment; that a judgment creditor, by such a sale, loses the lien of the judgment and his right to redeem, and the like. None of them are authority for saying that the right of a judgment debtor to redeem land from an execution sale is in any way restricted in case the redemption is made within a year from the sale.

In Bodine v. Moore (18 N. Y., 347), the correct principle is stated. The Kingston Bank held a certificate of sale, which had been running about four months. The debtor did not in person, or by any affirmative act, redeem from the sheriff's sale. His land was, however, converted into money by sale

^{*} People v. Easton, 2 Wend., 298; Exp. Stevens, 4 Cow., 136; Wood v. Colvin, 5 Hill, 228; Exp. Elwood, 1 Den., 633; Klock v. Cronkhite, 1 Hill; 110; Post v. Arnot, 2 Den., 344. [But compare Walsh v. Rutgers Fire Insurance Co., 13 Abb. Pr., 33.] Russell v. Allen, 10 Paige, 249; Jackson v. Bowen, 7 Cow., 21; People v. Beebe, 1 Barb., 388.

under a prior mortgage, and a portion of that money, sufficient for the purpose, was paid over in satisfaction of the claim which the bank had under the certificate. The bank accepted the money, and this was in effect, as the court of appeals held, a redemption from the sheriff's sale. It was effected with moneys raised out of the estate of the judgment debtor, which, as the court said, the bank would have been bound to accept if tendered by the debtor himself. It was further said, in the opinion in that case, that "a redemption by the debtor renders a sheriff's certificate null and void, as though the sale had never taken place. The very judgment on which the sale was had becomes again a lien, if it was not fully satisfied by the bid, and the land may be again sold. A redemption out of the debtor's funds. and effectuated by act of the law, should have the same effect. . . . It was virtually made by the debtor. . . . If the requisite amount of the surplus had been paid into the debtor's own hands and he had paid it over to the bank, it would have been a perfect and exact redemption from the sheriff's sale within the statute."

In the light of such authority there can be no difficulty in perceiving that Price had a right to redeem by the very terms of the statute (*Rev. Stat.*, 370, § 46).

The objection that his interest was totally divested by the conveyance to Latting is without force. Whether he had any interest in the land or not, the statute gave him the right of redemption; but his interest was not wholly divested by the conveyance to the receiver, Latting. That, as already remarked, was a conveyance which in its nature created a trust for creditors. Subject to the execution of the trust, the reversion belonged to Price, and he had sufficient interest to redeem (1 Rev. Stat., 730, § 67). So soon as the judgment and charges were paid, either by the judgment debtor or out of his property, the land conveyed to the receiver, Latting, would revert to the judgment debtor; and

probably when the statute of redemption was framed it was designedly worded to cover precisely such, as well as all other rights of the judgment debtor, respecting the redemption of his lands from an execution sale. If the principle that the right of redemption can only be exercised by one having the legal estate in the premises be applicable, as probably it is, to redemptions from tax sales, and to strangers who would unjustly intermeddle with the estate under an execution sale to the prejudice of the real party in interest, it has no such application upon reason or authority to the judgment debtor himself, whose land is sold under execution.

2. The next important question is whether Francis Price did redeem the premises from the sale and execution through which the defendant claims title. The paper, which is dated April 10, 1849, and signed by John J. V. Westervelt, sheriff, is not only a receipt for seventy-two dollars and five cents, but it contains the title of the action in the supreme court, in which the judgment was obtained, whereon the execution issued under which the sale in question was made.

It also recites the receipt from Francis Price, the judgment debtor, of seventy two dollars and five cents; and then follows this language: "Said moneys so paid by him to redeem property sold under an execution in the above entitled cause on April 13, 1848, situate in the Twelfth ward of the city of New York, the above amount being in full for the purchase-money and interest at ten per cent. for all the property sold by me on that day under said execution."

An attorney-at-law made this redemption; and that he acted for Francis Price is shown by a memorandum on the receipt in his handwriting, as follows: "I paid the sheriff the above money, and took the receipt for F. Price." This paper is in substance a sufficient certificate of redemption according to the fifth section of the statute of 1847, is signed by the officer who in con-

templation of law made the sale, and states "all such facts, transpiring before him at the making of such redemption as are sufficient to show the fact of such redemption" (2 Laws of 1847, p. 508, ch. 410, § 5; 4 Edm. St., 631).

It was not necessary that this certificate of redemption should be proved or acknowledged or filed. The redemption under the statute was complete when the money was paid to the sheriff. The sale of the premises under the execution and the certificate of sale which he had given became void by the redemption, and thenceforth were of no force or effect (2 Rev. Stat., 371, § 49).

As the receipt of sheriff Westervelt was an official act, and all the parties are deceased who took part in the redemption, it was competent, after proof of such decease, to read the paper in evidence.

The memorandum of the attorney of Price, written thereon, was also admissible in evidence (Leland v. Cameron, 31 N. Y., 115).

Such writings are admissible, within the principle of numerous authorities relating to the entries and memoranda of deceased persons. The receipt of the sheriff was a written paper against his interest, for by it he was charged for the amount of money mentioned in the receipt; and the principle applicable to such a paper is that it proves not only the simple fact of payment, but it may be received to every incidental matter stated in the declaration, even in an action between third persons (Middleton v. Melton, 5 M. & R., 264; 10 Barn. & Cr., 317). The rule has been asserted to the extent of a disregard of all reference to the circumstance of any privity between the deceased and the defendant (Goss v. Watlington, 3 Brod. & Bing., 132; Whitmarsh v. Genge, 8 Barn. & Cr., 556; 3 M. & R, 42).

It is said, in the text of 1 Phil. on Ev., p. 298, that the acknowledgements by deceased stewards, reeves

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and bailiffs, in their books, of the receipt of money for which they have been accountable, are very frequently adduced in evidence by their employers, or those claiming under them, or by strangers;" and, at page 299, it is remarked that "receipts for the payment of money, given to the person making the payment, appear to be admissible, after the death of the receiver of the money, to prove the fact of its having been received, though there exist no privity between the deceased and the party against whom the evidence is tendered." Lord Ellenborough said, in Harrison v. Blades (3 Camp., 458), that a tax gather's receipts would be evidence after his death, to prove who was the occupier of certain premises. For further illustrations of the rule, see Thompson v. Stevens, 2 Not. & McCord, 493; Chase v. Smith, 5 Vern., 559; Barker v. Ray, 2 Russ., 31, note b; Wilbor v. Selden, 6 Cow., 162; Leland v. Cameron, 31 N. Y., 115.*

It follows that the claim of title made by the defendant, founded upon the sale under the execution against Francis Price, is of no validity.

There should be judgment for the plaintiff, with costs, and the judgment should provide that the defendant, and all persons claiming under him, be forever barred from all claim to any estate of inheritance or freehold, or term of years, in possession, reversion or remainder, to the premises described in the notice by which this proceeding was commenced.

^{*} Compare Erickson v. Smith, 2 Abb. Ct. App. Dec., 64; and cases cited.



DIGEST

OF

ALL POINTS OF PRACTICE

EMBRACED IN

THE STANDARD NEW YORK REPORTS,

Issued during the period covered by this volume:

VIZ: 15 ABBOTT'S PR. REPORTS; 65 BARBOUR; 4 DALY; 46 HOWARD'S PRACTICE REPORTS; 7 LANSING; 52 AND 53 NEW YORK; 34 AND 35 NEW YORK SUPERIOR COURT R. (JONES & SPENCER); 1 AND 2 SU-PREME COURT R. (T. & C.)

And in a selection of cases in 5 and 6 English Reports (Moak's ed.)

ABATEMENT AND REVIVAL.

- An action commenced by a feme sole is not abated by her marriage pending the action, until an order is entered to that effect, under section 121 of the Code. 1873, Mapes v. Snyder, 2 Supreme Ct. (T. & C.), 318.
- A cause of action for breach of promise of marriage does not survive defendant's death occurring while the action is undetermined; and such action can not be continued against the executor or administrator. Wade v. Kalbfleisch, Ante, 16.
- 3. The causes of action which, under the statutory modifications of the common law, survive the death of the party, are those which concern property. The action for breach of promise, though in form on contract, is strictly personal, and can neither be assigned nor survive. Ib.
- 4. The profit, or intent to gain profit, by the publication of a libel, does not make an action for damages for libel an exception to the rule, that a cause of action for a personal wrong abates by defendant's death before verdict. Supreme Ct. Sp. T., 1873, More v. Bennett, 65 Barb., 338.
- Effect of consolidation of two corporations pending action against one, and substitution of the consolidated company. Prouty v. Lake Shore & Michigan Southern Railroad Co., 52 N. Y., 363.

ACKNOWLEDGMENT OF DEEDS.

- 6. If a sole surviving partner, against whom an action to recover on a partnership liability is pending, dies, his executors are the proper parties defendant to be brought in in his place. Carrere v. Spofford, Ante, 47.
- 7. The right of the representatives of a deceased party to continue an action pending at his death, is not an absolute legal right, but rests in the discretion of the court to which the application is made under section 121 of the Code; and leave to continue the action may be granted or refused according to particular circumstances of each case. Ct. of App., 1873, Beach v. Reynolds, 53 N. Y., 1.
- 8. A long delay in making the application, unexcused, constitutes laches, and a valid reason for refusing the leave asked. In such cases the equitable rule, which requires reasonable diligence, and good faith to put the court in motion, prevails, and the court will not aid a party who has slept upon his rights in the enforcement of stale demands. *Ib*.
- 9. The overseer of the poor of the town of A. brought certiorari against the respondents to reverse bastardy proceedings. After service of the writ, and the filing of the return, relator's term of office expired. Held, that under the statute (2 R. S., 474, § 100) the relator's successor could not be substituted, the word "suit" or "action" not including certiorari, it being a special proceeding. [1 Barb., 10; 16 Barb., 593; 19 N. Y., 532; 7 How., 147; 14 Id., 530; 27 Id., 158]. 1873, People ex rel. Wicks v. Oswego County Court of Sessions, 2 Supreme Ct. (T. & C.), 431.

ACCOUNTING.

- In an action to settle partnership affairs, the sale of partnership realty may be decreed without requiring the parties to bring an action of partition. Supreme Ct., 1873, Parker v. Parker, 65 Barb., 205.
- Rights of partners in respect to interest on an accounting. Johnson v. Hartshorne, 52 N. Y., 173.

PARTIES, 1-12, 24.

ACKNOWLEDGMENT OF DEEDS.

- 1. The wife's assent to the conveyance before the acknowledging officer may be implied from her silence, and she is afterwards estopped from claiming that the act was invalid. Supreme Ct., 1872, Rexford v. Rexford, 7 Lans, 6..
- Introduction of the party acknowledging a deed, to the officer, by and in the presence of persons known to the officer, is sufficient

ACTIONS.

to enable him to certify that he knows the party as required by law; though if he makes a mistake the deed could be avoided. Ib.

- 3. The acknowledgment of a deed must show that the party acknowledging the instrument was known, or proven to the officer taking the acknowledgment to be the party named in, and who executed the same. Saying "Personally appeared, Λ. Β.," is not enough. 1873, Miller v. Link, 2 Supreme Ct. (T. & C.), 86.
- 4. It is not essential to validity of a deed, that the certificate of aeknowledgment should state that the evidence of the witness who swears to the grantor's identity is "satisfactory evidence" to the officer, nor that the certificate should set out the officer's knowledge of witness. It is only when the subscribing witness makes the acknowledgment the officer need certify to his knowledge of the witness; and the subscribing witness must testify to his residence. 1873, Ritter v. Worth, 1 Supreme Ct. (T. & C.), 406.

DEEDS.

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- 1. If a complaint states facts giving an equitable cause of action, and also a legal cause of action arising out of the same transaction, a party is entitled to have the issues in both causes tried, if necessary to obtain his rights, and although he fail to make out a case for purely equitable relief, yet if he prove facts showing a legal cause of action his complaint should not be dismissed, but money damages awarded him. Sternberger v. McGovern, Ante, 251.
- 2. The summons was for money, not for relief; and the complaint averred facts making out a cause of action on contract. Held, that the addition of averments of false and fraudulent representations did not make the action one for tort, so as to prevent a recovery for breach of implied warranty of title. Ct. of App., 1873, Ledwich v. McKim, 53 N. Y., 307; affirming 35 N. Y. Superior Ct. (3 Jones & S.), 304.
- 3. The owner of a dock and vessel, on the boundary between New York and Brooklyn, which were injured by a mob, brought simultaneous actions against both cities, and recovered full damages against Brooklyn in the one first tried. The city of Brooklyn paid the judgment, and took an assignment of it, and caused the other action to be prosecuted in the name of the assignor against the city of New York. Held, that the city of New York could not defeat the action by the objection that the nominal plaintiff had already received satisfaction for the injury; for satisfaction by a stranger is no plea; nor on the ground that the plaintiff was not the real party in interest; for under the Code, an action may be

ADVERSE POSSESSION.

- continued in the name of the original party unless the court orders substitution. Ct. of App., 1873, Atlantic Dock Co. v. Mayor, &c. of New York, 53 N. Y., 64.
- 4. A party applying to a court or judicial officer having no jurisdiction of the subject matter, and obtaining an attachment and delivering it to the sheriff for service, is liable in damages to the defendant in the attachment, if the process be void for want of jurisdiction or for any other cause. Ct. of App., 1873, Miller v. Adams, 52 N. Y., 409; affirming 7 Lans., 131.
- 5. A right to use the water of a well, as owner of a part of the ground on which it stands, must be asserted at law; but if the right is an easement, relief restraining interference with its exercise can be afforded in equity. Supreme Ct., 1872, Applegate v. Morse, 7 Lans., 59.
- 6. Where the goods of A. are obtained by the fraud of B. and delivered to C., under circumstances which do not deprive A. of his title, and C. refuses to return the goods, and appropriates them to his own use, A. may maintain an action for goods sold against C., especially if no question as to the pleadings is raised on the trial, Ct. of App., 1873, McGoldrick 2. Willits, 52 N. Y., 612.
- Action can not be sustained if a contract on which it is even indirectly founded is void by the statute of frauds. Ct. of App., 1873, Dung v. Parker, 52 N. Y., 494; reversing 3 Daly, 89.
- 8. An action brought to recover the excess of interest, and collateral securities, received in violation of the statute in relation to usury, is not a local action. The right can be enforced wherever courts have jurisdiction of the persons of the parties. Wheelock v. Lee, Ante, 24.
- Where the plaintiff fails to sustain his complaint, the court can not adjudicate upon the rights and equities of the defendants as between themselves. [25 N. Y., 266; 2 Rob., 676.] 1873, Martin v. Wagener, 1 Supreme Ut. (T. & C.), 509.
- 10. Of the proper form of action against one who assumes to act for a principal without authority, and draws another into a contract on the assumption of such agency. Dung v. Parker, 52 N. Y., 494; reversing 3 Daly, 89.
- Action to remove cloud on title; distinguished from action for partition sale. Parisen v. Parisen, 1 Supreme Ct. (T. & C.), 642, S. C., 46 How. Pr., 385.

ABATEMENT AND REVIVAL; EVIDENCE; Costs, 9.

ADVERSE POSSESSION.

Distinction between requisites of adverse possession for the purpose of statute of limitations, and for the purpose of avoiding a deed. Sands v. Hughes, 53 N. Y., 287.

AMENDMENT.

ALIMONY.

The granting of alimony, even after judgment of divorce, is within
the jurisdiction of a court having jurisdiction of a divorce suit; and
an order made for that purpose can not be attacked collaterally
[1 Johns. Cas., 492; 3 Cow., 511; Id., 331; 13 Pet., 511; 9 N. Y.,
263; 18 N. Y., 597; 48 N. Y., 53; 45 N. Y., 542]. Supreme Ct.
(Leonard, Ref.), 1873, Kamp v. Kamp, 46 How. Pr., 143.

 Alimony claimed by a wife after long separation, is not computed on present income of husband, if greatly increased. Powell v. Powell, 6 Eng. R. (Moak's ed.), 346; L. R. [3 Prob. & D.], 55.

3. A woman who intervenes in an action of divorce, on the ground of having contracted a marriage with the husband who is a party to the action, the validity of which marriage might be affected by a judgment in the action, may be allowed alimony and counsel fee therein. Anonymous [No. 2 of this Title], Ante, 307.

4. After a judgment which dismisses her in effect from the action, she is no longer entitled to alimony; but the court may still allow her a counsel fee to enable her to litigate the case on appeal. *Ib*.

5. If future alimony ought to be paid after judgment, a clause to that effect should be inserted in the judgment; or if reasons exist for its payment pending an appeal, a fresh application should be made. Supreme Ot., 1872, Wood v. Wood, 7 Lans., 204.

AMENDMENT.

- The court may, under the Code, at any time before trial, allow a
 defendant to amend his answer by setting up a new defense. N. Y.
 Com. Pl., 1873, Diamond v. Williamsburgh Ins. Co., 4 Daly
 494.
- The case of Woodruff v. Dickie [5 Robt., 619; 31 How. Pr., 164], holding the contrary, Held, to have been erroneously decided. B.
- 3. The nature of the power which the court had at common law, to allow amendments, investigated, the enlargement of it by statutes and judicial decisions, examined, and the cases, reviewed. *Ib.*
- 4. It is not indispensable that there should be something to amend by, for an amendment is not solely the correction of an error in a pleading already before the court, but may consist in the withdrawal of it, and the substitution of a new and different defense. Ib.
- 5. An amendment to a pleading can only be made when the pleading remains, not after it is stricken out as sham [21 How. Pr., 378; 5 Duer, 654]; and a judgment entered after the answer is stricken out, will not be set aside so as to let a previously amended answer stand. N. Y. Superior Ct., Sp. T., 1873, Schmid v. Arguimbau, 46 How. Pr., 105.

ANIMALS.

- 6. The counsel who have charge of the trial of a case have authority to amend the pleadings at the trial, without the knowledge of the attorney of record. Devlin v. Mayor, &c. of N. Y., Ante, 31.
- 7. When the propriety of setting up a counterclaim first appears during the trial before a referee, the trial may be suspended, and upon application to the special term an order may be obtained permitting defendant to amend his answer by setting up that or any other new defense. [53 Barb., 525; 13 Abb., 207; How., 294; Code, §§ 173-177.] But such leave will be granted only when a strong case is presented, and there have been no laches on the part of the moving party. 1874, Mitchell v. Bunn, 2 Supreme Ct. (T. & C.), 486.
- 8. A landlord, claiming a lien under his lease, on certain produce of his tenant, sued a third person for the proceeds of the produce, alleging the lien, but also alleging in general terms a right to the fund, and notice of his claim to, and demand on defendant. Held, that the lease not giving a lien, it was proper for the court at the trial to amend the complaint, of his own motion, so as to allow plaintiff to prove a release and assignment to him from the tenant. The same parties, and the same form of action and proof of the lease would be necessary if he were put to a new action. 1873, Barber v. Marble, 2 Supreme Ct. (T. & C.), 114.
- Where the pleadings will be conformed to the proof—stated. Kock
 Bonitz, 4 Daly, 117.
- 10. The writ of commission to take testimony is to be regarded as process, and is amendable wherever process is amendable. An amendment will be allowed whenever it is in furtherance of justice, if the court has jurisdiction of the action in which the amendment is sought to be made. N. Y. Com. Pt., Sp. T., 1873. Letch v. Atlantic Mut. Ins. Co., 4 Daly, 518.
- 11. The general subject of amending process at common law, and under the statute, discussed. 1b.

APPEAL, 45; LIMITATIONS, 5; PARTIES, 16; SUBMISSION, 2.

ANIMALS.

1. Under 2 Laws of 1867, c. 814, amending Laws of 1862, c. 459, authorizing the seizure by a land-owner of cattle trespassing, and the subsequent issue, service and posting of a summons to the owner on the seizor's complaint, and the detention of the cattle subject to the right of the owner to reclaim them on paying to the justice certain costs, &c., the seizor is not liable to an action for irregularity in the summons in failing to specify the place of return, nor for an omission to post the summons. Ct. of App., 1873, Leavitt v. Thompson, 52 N. Y., 62; reversing 56 Barb., 542.

ANSWER.

- 2. The seizor is not made a wrong-doer by refusing to surrender the cattle, except on payment of more than the owner is bound to pay, unless the owner has had the amount to be paid, liquidated by and paid to the justice. *Ib*.
- 3. In an action of trespass for damage done by cattle, with a claim for taking the cattle from plaintiff's possession after he had them in custody, under L., 1862, C. 459,—Held, error to charge that the jury might allow as damages, besides the injury to the crops, &c., fifty cents per head for the cattle retaken. The statute allows that sum as a compensation for the seizure, and for seeking the remedy in the manner prescribed. The right to the penalty is not complete until a sale of the cattle, and it was accordingly error to assume that plaintiff would have instituted proceedings under the act, &c. Supreme Ct., 1872, Hickox v. Thurstin, 7 Lans., 421.
- 4. In respect to offenses consisting in cruelty to animals, the act of 1867 is to be deemed declaratory of the common law; and driving a horse, while ignorant that it is sick or sore, is not, per se, tormenting or torturing it, within the meaning of the act. Stage Horse Cases, Ante, 51.

ANOTHER ACTION PENDING.

The pendency of a former action against A. and B. to recover possession of a tract of land, is a good defense in abatement to a subsequent action brought against either A. or B. for a part of the same land, if it was not alleged in the prior action that the defendants had any joint interest. [Distinguishing 2 Sim. and Stu., 464]. Supreme Ct., 1873, Dawley v. Brown, 65 Barb., 107, 126.

PLEADING, 1.

ANSWER.

- 1. Under the Code the answer may contain as many defenses as the defendant may have; and while one or more defenses, or the whole answer, are subject to a motion to strike out for being sham or irrelevant, or to demurrer, a motion to strike out as frivolous can only be made in respect to the whole answer. Judgment can not be ordered on the frivolousness of a single defense in an answer containing another defense. [245 N.Y., 468]. Ct. of App., 1873, Strong v. Sproul, 53 N. Y., 497; reversing 4 Daly, 326.
- After an answer has been struck out as sham, a new answer can not be served without leave of court, even if twenty days have not elapsed since the answer was served. [Code R. N. S., 41]. N. F. Superior Ct., Sp. T., 1873, Schmid v. Arguimbau, 56 How. Pr., 105.
- 3. In a husband's action for divorce, on the ground that he had a former wife who was living at the time he married defendant, and

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at the time of the commencement of the action, an allegation in the answer, that plaintiff had, before marrying defendant, procured a decree of court adjudging him at liberty to marry, and that defendant had thereupon in good faith married him, being induced by his fraud to believe that he was at liberty to marry, is immaterial. Anonymous [No. 3 of this Title], Ante, 311.

4. An allegation in the answer, that defendant has no knowledge or information sufficient to form a belief as to whether the first wife was living at the commencement of the action, is a denial of a

material allegation. Ib.

5. An allegation in the complaint, charging defendant with knowledge of the prior marriage at the time of her marriage with plaintiff, is material upon the question of costs, and perhaps on that of the legitimacy of the children, and of alimony; and since an omission to deny it would admit it, it may properly be denied in the answer. *Ib*.

After a demurrer to a complaint has been overruled, defendant may set up as a defense the same ground urged in support of the demurrer. 1874, Smith v. Britton, 2 Supreme Ct. (T. & C.), 498.

- 7. An answer in an action on a promissory note, setting up the defense that defendant's indorsement was procured by duress, of which plaintiff had notice denying intent, &c., to charge separate estate, is not frivolous. 1874, Klots v. Fincke, 2 Supreme Ct. (T. & C.), 580.
- 8. An answer, by the publisher of a newspaper sued for libel, denying that the article complained of was published with defendant's knowledge, consent, assent or permission, and denying that any person employed by defendants had any right or authority from defendants to publish it,—Held, not frivolous. Samuels v. Evening Mail Association, 52 N. Y., 625.
- 9. Where the denials of the answer go to portions of the complaint not necessary to sustain the action,—e. g., where in an action for dissolution of a corporation on the ground of its paying money in pursuance of a corrupt and fraudulent agreement, and acts of extravagance in purchases, &c., the answer alleges that the money was paid under the advise of counsel, denies the allegations of extravagance, and also alleges that only three of the old board of trustees have been re-elected, and that the present board are competent to manage the affairs of the corporation—the answer is frivolous. Supreme Ct., Sp. T., affirmed at Gen. T., 1873, People v. Dispensary & Hospital Society, 7 Lans., 304.

10. The defense that the application and survey were part of the policy,—Held, one that must be set up in the answer, to be available. Supreme Ct., 1872, Weed v. Schenectady Ins. Co., 7 Lans., 452.

- 11. In an action on a sale, an answer, alleging that plaintiff represented the merchandise to be merchantable, on which representation defendant's agent relied, and that the agent was not authorized to buy an unmerchantable article, and that the article was not merchantable, and was known to plaintiff not to be such,—Held, not sufficient to admit evidence that plaintiff intended to sell the article as merchantable, because not alleging intent to deceive and actual deceit. Lefler v. Field, 52 N. Y., 621.
- 12. An affirmative defense,—e. g., that defendant was a bona fide holder without notice—though alleged in avoidance of allegations in the complaint, is not to be taken as true, merely because plaintiff gives no evidence on the point. 1873, Town of Venice v. Breed, 1 Supreme Ct. (T. & C.), 130; S. C., 65 Barb., 597.
- 13. In foreclosure, an answer stating merely that the mortgage is of no binding effect, and no lien on the premises described in the complaint, is a statement of a conclusion unsupported by facts, and is unavailing. Supreme Ct. 1873, Caryl v. Williams, 7 Lans., 416.
- Statute of frauds need not be pleaded. Morrill v. Cooper, 65
 Barb. 512.

AMENDMENT, 45; APPEAL, 12; CONTRACT, 1.

- 1. The general term may review, by appeal, an order of the special term, made on a summary application, in an action after judgment and affecting a substantial right, although upon a question of discretion. But an appeal to the court of appeals does not lie from the general term in such a case. [Distinguishing Howell v. Mills, 53 N. Y., 322.] Livermore v. Bainbridge, Ante, 436.
- Setting aside a report, for misconduct of a referee, is an exercise
 of discretion, within this rule, Ib.
- To same effect, Gray v. Fisk, 53 N. Y., 630; affirming 33 N. Y. Superior Ct. (1 J. & S.), 484; S. C., 12 Abb. Pr. N. S., 213; 42 How. Pr., 135.
- Upon appeal from an order, the court of appeals are not precluded from passing on the facts, even where the evidence is conflicting. Wilmerdings v. Fowler, Ante, 86.
- 5. An order denying a motion for a resale, when it involves matters of legal right based upon fixed legal principles, is appealable to this court. Thus, where the sale was irregular and conducted contrary to law, and the motion was not denied because defendant had another remedy, the court may entertain the appeal, especially where the parties injured were infants. [Reviewing authorities]. Ct. of App., 1873, Howell v. Mills, 53 N. Y., 323.

- 6. It is in the discretion of the court in which an action is pending, to set aside a stipulation of counsel and the order of the court entered thereon, and an appeal therefrom does not lie to the court of appeals. No fixed legal right exists to retain an order or even a judgment which the court, in the exercise of its discretion, may set aside; especially where vacating the order merely denies a summary remedy and leaves the party to his action. Ct. of App., 1873, Barry v. Mutual Life Ins. Co., 53 N. Y., 536.
- 7. An order refusing to proceed summarily against the sheriff, for payment of moneys as to which he is under injunction from a court of bankruptcy, and leaving the parties to an action, is discretionary with the court, and not the subject of appeal to the court of appeals. Ct. of App., 1873, Mills v. Davis, 53 N. Y., 349; affirming in effect, 35 N. Y. Superior Ct. (3 Jones & S.), 355.
- 8. Subjecting a party to punishment affects a substantial right; but the refusal of the special term to punish a party alleged to have violated an order of the court, made in the progress of the action, unless the other party had a legal right to demand the relief granted by the order alleged to have been violated, does not affect a substantial right, and is not an order from which an appeal can be taken within section 11 of the Code. Ct. of App., 1873, Carrington v. Florida R. R. Co., 52 N. Y., 583.
- On appeal from an order punishing for contempt, the appellate court can not consider new affidavits alleging that the party has meanwhile complied with the order of the court below. People ex rel. Day v. Bergen, Ante, 97.
- 10. The rule that an order affecting a strict legal right is appealable [10 How., 89; 28 Barb., 480; 3 N. Y., 334; 23 Id., 160; 41 Id., 358], e. g., opening an adjudication after the statute of limitations has elapsed,—applied. 1874, Depew v. Dewey, 2 Supreme Ct. (T. & C.), 515; S. C., 46 How. Pr., 441.
- 11. An order allowing a referee appointed to sell under a foreclosure sale a sum greater than the statutory fees, affects a substantial right, and is appealable. [Code, § 349, subd. 5; 29 N. Y., 418; 37 N. Y., 380.] 1874, Innes v. Purcell, 2 Supreme Ct. (T. & C.), 538.
- 12. An order compelling a party to make his pleading more definite and certain, is not appealable. Geis v. Loew, Ante, 94.
- 13. An appeal does not lie to the court of appeals from an order, though in the form of a judgment, reversing a judgment for plaintiff, given at special term for frivolousness of the onaer, and giving plaintiff leave to plead, &c. Whether the sufficiency of an answer shall be determined on motion, or on demurrer, is in the

- discretion of the court. Ct. of App., 1873, Wilkin v. Raplee, 52 N. Y., 248.
- 14. In an action against a sheriff by a defendant in replevin, for failure of sureties to justify, objection to the sheriff's liability can not be raised for the first time on appeal. Supreme Ct., 1872, Hofheimer v. Campbell, 7 Lans., 157.
- 15. In partition, the objection that the complaint contained no averment that plaintiff was in possession of the premises sought to be partitioned, can not be taken for the first time on appeal to the general term. It should be taken by demurrer or answer, and when it is not, the judgment must conclude the parties. Supreme Ct., 1872, Howell v. Mills, 7 Lans., 193.
- 16. An appeal lies from an order opening a default so far as to allow defendant to depend on one issue only when there is another material issue in the pleadings; and defendant's appeal from the order, raises the question as to the validity of such a condition. N. Y. Superior Ct. Sp. T., 1873, Horn v. Brennan, 46 How. Pr., 479.
- 17. An order absolutely and unconditionally staying, without limit, the proceedings in an action, before judgment (in this case made on the ground that a court of the United States, having exclusive jurisdiction, had forbid the party to proceed) is an order which prevents the entry of judgment, and in effect determines the action; and an appeal lies to this court. Ct. of App., 1873, Knowlton v. Providence & N. Y. Steamship Co., 53 N. Y., 76.
- 18. An order in foreclosure, staying plaintiff's proceedings until further default, determines the action, and prevents a judgment, &c., and is, therefore, appealable to the Court of Appeals. Ct. of App., 1873, Bennett v. Stevenson, 53 N. Y., 508.
- 19. An order for the issue of a commission to examine witnesses, with a stay of proceedings, although discretionary, affects a substantial right, and is appealable to the general term. [41 How. Pr., 350.] 1872, Rathbun v. Ingersoll, 34 N. Y. Superior Ct. (2 Jones & S.), 211.
- 20. Appeal lies to the general term from an order granting discovery and inspection; and it seems, from any order though discretionary. 1872, Central National Bank v. Clark, 34 N. Y. Superior Ct. (2 Jones & S.), 487.
- 21. An order denying a motion for a commission to take testimony of a foreign witness affects a substantial right, and is therefore appealable. 1874, Wallace v. Am. Linen Thread Co., 2 Supreme Ct. (T. & C.), 571; S. C., 46 How. Pr., 403.
- 22. An order granting a commission does not affect a substantial right,

- and is not appealable. Ib.; Treadwell v. Pomeroy, 2 Supreme Ct. (T. & C.), 470.
- 23. An objection taken on the examination of a witness de bene esse, but not interposed at the reading of the deposition on the trial, not available on appeal. Martin v. Silliman, 53 N. Y., 615.
- 24. An order denying a motion to vacate a compulsory order of reference, affects a substantial right within section 349, Sub. 3 of the Code, and is appealable. [40 How., 143.] 1874, Brink v. Republic Fire Ins. Co., 2 Supreme Ct. (T. & C.), 550.
- 25. The rule that improper rejection of evidence of an unimportant character, which evidently did not change the result will be disregarded. [20 N. Y., 244; 15 Abb. Pr., 384,—reiterated.] N. Y. Superior Ct., 1873, Townsend v. Narragansett Ins. Co., 46 How. Pr., 40.
- 26. The rule that an objection not taken on the trial, where it might have been obviated, will be deemed waived, and can not be raised for the first time on appeal,—reiterated. 1873, Chace v. Higgins, 1 Supreme Ct. (T. & C.), 230.
- 27. Error in a finding of the jury, that a lease containing a proviso that the same should become void by subletting, or reletting, was broken by an assignment of the term,—Held, not available on appeal, because attention was not called to it in the court below. 1873, Collins v. Hasbrouck, 1 Supreme Ct. (T. & C.), 36.
- 28. A defense can not be disregarded on appeal, on the ground, not taken in the court below, that it was inconsistent with another defense. Jackson v. Van Slyke, 52 N. Y., 625.
- 29. Where the allegations in a complaint are not directly denied by the answer, but the defendant sets up, as an affirmative defense, facts antagonistic to those alleged in the complaint, and on the trial the defense is proved without the objection that an opposite state of facts is admitted, because not denied, the allegations of the complaint must be treated, on appeal, as if denied by the answer. 1873, Duel v. Lamb, 1 Supreme Ct. (T. & C.), 66.
- 30. The rule that a judgment will be reversed on account of the admission, under objection, of improper evidence, unless there is clear, uncontradicted evidence of other facts in themselves sufficient to support the judgment,—applied. 1873, Swift v. Mass. Mut. Life Ins. Co., 2 Supreme Ot. (T. & C.), 302.
- 31. Trial of questions of fact by a jury, in an equitable case, where the relief demanded is purely of an equitable charater, is not a matter of right. It is discretionary with the court, and its decision thereupon is not reversable. Supreme Ct., 1872, Rexford v. Marquis, 7 Lans., 249.

- 32. The decision of the court as to what questions of fact the jury shall be instructed to find specifically upon, under section 261 of the Code, is not appealable. Hackford v. N. Y. Central R. R. Co., 53 N. Y., 654.
- 33. The court of appeals has not the power (although it seems that the general term has the power) to examine whether, upon the trial, the appellant sustained any injury from the jury having been misled by improper remarks of the judge during the trial, which were not excepted to, or not proper subject of exception. Ct. of App., 1873, Hamilton v. Third Ave. R. R. Co., 53 N. Y., 25; reversing 35 N. Y. Superior Ct., (3 Jones & S.), 118; S. C., 13 Abb. Pr. N. S., 318; 44 How. Pr., 294.
- 34. An appeal does not lie from an order made at special term sustaining exceptions to the report of a referee. The proper course is to enter judgment, and appeal from such judgment. Supreme Ct., 1874, Hemphill v. Tull, 46 How. Pr., 384.
- 35. Finding of referee, *Held*, supported by testimony of one witness, although there were four witnesses to the contrary. Wright *τ*. Saunders, 65 *Barb*., 214.
- 36. An order denying a motion that the cause be sent back to a referee for further findings, can not be separately reviewed in the court of appeals, but only on appeal from the judgment [reiterating 46 N. Y., 260]. Such an order is to be treated as an intermediate order involving the merits, and necessarily affecting the judgment within section 11, subd. 1 of the Code of Pro. Ct. of App., 1873, Quincey v. Young, 53 N. Y., 504.
- 37. Although on appeal from an order denying a new trial, asked solely on the judge's minutes, the appellant can not insist that the verdict is against the weight of evidence, yet where appeal is taken not only from the judgment, but also from the order made on a subsequent motion, founded on a case or exceptions, the court should examine the evidence to ascertain if it supports the verdict. Carnes v. Platt, Ante, 337.
- 38. Although a departure, in the judgment, from the decision of the court may be ground of appeal, a new trial will not be awarded, if it be conceded that the facts are such that the appellant can not be benefited by a new trial. 1874, Stevenson v. Spratt, 35 N. Y. Superior Ct. (3 Jones & S.), 496.
- 39. The objection that the judgment as entered gives the relief more minutely than it is stated in the decision, is not available on appeal, if the relief intended to be given is not enlarged. Supreme Ct., 1872, Appelgate v. Morse, 7 Lans., 59.
- 40. An appeal was taken from an order directing judgment, not from the judgment. Held, that the respondent could avail himself of the

- error only by motion to dismiss the appeal. 1874, Klots v. Fincke, 2 Supreme Ct. (T. & C.), 580.
- 41. The rule that this court will revise the decisions of county judges on the trial of causes, only after a motion for a new trial has been made in that court [48 Barb., 342],—reiterated. 1873, Dahash v. Flanders, 2 Supreme Ct. (T. & C.), 445; Lester v. Rome, &c. R. R. Co., 1d., 672.
- 41. A reversal by the general term of an order of the county court, denying a motion to set aside proceedings, does not, without an order to that effect, set them aside. Supreme Ct., 1872, Miller v. Adams, 7 Lans., 131 (Aff'd in 52 N. Y., 409).
- 43. The fixing of the day up to which interest shall be computed, in the report of a referee determining the priority and amount of claims to surplus moneys, is matter of discretion, and is not reviewable at general term. 1873, Loverhill v. Suydam, 2 Supreme Ct. (T. & C.), 460.
- 44. In an action against two, alleging a joint debt, the proof was of a joint contract by which each was to pay half the sum sued for. Held, on appeal by one from a joint judgment for the whole sum against both, that the court, under section 366 of the Code, might affirm the judgment as to half the claim and against the appellant, and strike out the name of the other defendant. 1873, Angell v. Cook, 2 Supreme Ct. (T. & C.), 175.
- 45. Plaintiff, in foreclosing mortgages, made R. and K. parties, and asked for judgment for deficiency against both. R. alone answered. Judgment was rendered holding R. primarily liable, and after him K. R. appealed, but served no notice on K., and obtained a reversal of so much of the decree as declared him personally liable. Plaintiff issued execution on the judgment as modified by the appellate court. On application of K. this execution was set aside at special term, upon the ground that K., not being a party to R.'s appeal, was not bound by the modified judgment. Held, error. K. not having answered, admitted the allegations of the complaint, and also admitted the allegations of R.'s answer, so far as it affected the equities between him and R. [47 N. Y., 293.] He was not, therefore, an aggrieved party within section 325 of the Code, nor an adverse party within section 327. 1873, Garnsey v. Knights, 1 Supreme Ct. (T. & C.), 259.
- 46. As to the issue between plaintiff and R., the only one litigated, K., was not a party. If at special term it had been held that R. was not personally liable, K. not having answered, could not have appealed. [8 Barb., 351; 20 Johns., 282; 1 Keyes, 548; 25 Wend.] Ib.
- 47. After judgment in an action against a sole defendant, a motion to vacate the judgment and amend the proceedings, so as to include

another person as joint debtor was granted, and he was accordingly served with the amended summons. Held, that he had no right to appeal from the order, for he was not aggrieved by being summoned, within section 320 of the Code, which allows any person aggrieved to appeal. 1872, Grant v. Hubbell, 34 N. Y. Superior Ut. (2 Jones & S.), 224.

- 48. An undertaking given on appeal to the court of appeals to pay the amount directed to be paid by the judgment, &c., pursuant to section 335 of the Code, renders the obligors liable for the costs included in the judgment of the general term. 1873, Shankland v. Hamilton, 1 Supreme Ct. (T. & C.), 239.
- 49. The rule that when the case does not contain any evidence, it will be presumed that there was evidence to sustain the findings of the referee [46 N. Y., 627],—applied. 1872, Beard v. Sinnot, 35 N. Y Superior Ct. (3 Jones & S.), 51.
- 50. When a case does not state that it contains all the evidence, the question of the sufficiency of the evidence to sustain the findings is not before the court. 1873, Parsons v. Coburn, 2 Supreme Ct. (T. & C.), 324.
- 51. An appeal does not lie to the court of appeals from a judgment on certiorari, affirming a county judge's decision, on a disagreement between a plank road company and tax assessors.* People ex rel. Addison, &c. Plank Road Co. v. Freeman, 52 N. Y., 656.
- 52. Appellate court will not reverse proceedings on certiorari on the objection, not taken by motion to quash, below, that the relator was not technically a party to the proceedings. Ct. of App., 1873, People ex rel. Sheridan v. Andrews, 52 N. Y., 445.
- 53. On an appeal in a cause involving the construction of a will by the aid of extrinsic evidence, the appellate court is not necessarily concluded by a finding of the judge below of the testator's intent, "as a conclusion of fact." Intent is in some cases a question of fact, especially when it characterizes the act, making it lawful or otherwise; and in such cases the finding of the fact by the court of original jurisdiction may be conclusive in the court of appeals. So where a testamentary provision is equivocal, and the intent of the testator, as proved by extrinsic evidence, alone determines the gift. The intent may be a question of fact which the court of appeals could not review. But the construction of a will or other instrument in writing is always a question of law; and the appellate court, like the court of original jurisdiction, are entitled, if the question be one of construction, to the aid of surrounding circumstances. So held, where the judges' finding of the intent was

^{*} The decision here sought to be reviewed is reported in 3 Lans., 148.

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- "as a conclusion of fact and as a constructon of said will." Ct. of App., 1873, St. Luke's Home v. Association for relief of Aged Indigent Females of N. Y., 52 N. Y., 191; reversing 34 N. Y. Superior Ct. (2 Jones & S.), 241.
- 54. An application for leave to issue execution, when leave is necessary, is addressed to the discretion of the court, and if denied the remedy is to apply for leave to sue on the judgment. An appeal to the court of appeals does not lie. Ct. of App., 1873, Shuman v. Strauss, 52 N. Y., 404; affirming in effect 34 N. Y. Superior Ct. (2 Jones & S.), 6.
- Leave to sue on a judgment, not appealable. Hanover Fire Ins. Co. v. Tomlinson, 2 Supreme Ct., (T. & C.) 657.
- 56. Reargument is not granted upon grounds which question the correctness of the former decision upon the law and the facts as they were before the previous general term. [1 Sweeny, 217.] 1872, Pendleton v. Lord, 34 N. Y. Superior Ct. (2 Jones & S.), 301.
- Nor for mere technical mistrial. Coogan v. Mayor, &c. of N. Y.,
 Supreme Ct. (T. & C.), 667.
- 58. Nor on the ground of surprise, if it be shown that the contradictory testimony relied on was merely cumulative. 1873, Ritter v. Phillips, 35 N. Y. Superior Ct. (3 Jones & S.), 388; affirmed on the merits in 53 N. Y., 586.
- 59. On application for reargument of an order dismissing complaint, the court will, in a proper case, amend the order, so as to allow a new trial, notwithstanding plaintiff might appeal to the court of appeals. 1872, Giles v. Austin, 34 N. Y. Superior Ct. (Jones & S.), 540.
- 60. After the remittitur from the court of appeals has been filed in the court below, and the usual order entered thereon, it must be returned, by the direction of the lower court before the court of appeals can grant a reargument of the appeal. Wilmerdings v. Fowler, Ante, 86.
- 61. The mere coming of the remittitur to the hands of the clerk of the court below, is not an actual filing. So held, where, on being served with the stay, he handed the remittitur back to the attorney, without having marked it—filed, and expressly refused to file it. Cushman v. Hadfield, Ante, 109.
- 62. According to the practice of the New York common pleas, a dismissal of appeal is not the exclusive remedy for neglect to serve the printed papers, but the general term have power to affirm by default, and if they do so, the court at special term will not interfere with the judgment. Brown v. Niess, Ante, 344.
- 63. The two years allowed for appeal is intended to afford means of appeal from such separate judgments in favor of several defend-

ABREST.

ants as are authorized by the Code, and only within that period. Camblos v. Butterfield, Ante, 197.

64. When a judgment has been reversed, and the reversal entered on the docket, the lien of the judgment upon land ceases, and a sale and conveyance thereafter made is not affected by a subsequent reversal of the order of reversal. Supreme Ct., Sp. T., 1873, Foot v. Dillaye, 65 Barb., 521.

Attorney-General; Case; Costs, 28, 29; Court of Appeals, 3; Depositions, 5; District Court; Highways, 8; Judgment, 12; Justice's Court, 8-11, 14; Motions and Orders, 3.

APPEARANCE.

- An appearance by a defendant generally, in an action, waives any want of jurisdiction in the court over his person. Wheelock v. Lee, Ante, 24.
- Relief from an unauthorized appearance of an attorney will not be granted when the moving party has been guilty of laches. [13 How., 93; 16 Id., 385; 11 N. Y., 274; 22 Id., 319; 27 Id., 638]. 1874, Depew v. Dewey, 2 Supreme Ct. (T. & C.), 515; S. C., 46 How. Pr., 441.

Costs, 5; SUMMARY PROCEEDINGS, 2.

ARBITRATION.

- 1. Effect of stipulation in contract, to arbitrate if controversy arises. 6 Eng. R. (Moak's Ed.), 800, n.; Id., 516, 868.
- Corruption not inferred from arbitrators and solicitor lunching with, and at expense of one party, in the absence of the other.
 Moseley v. Simpson, 6 Eng. R. (Moak's Ed.), 729; L. R., 16 Eq., 226.

ARREST.

- 1. Although as a general rule, an affidavit made for the purpose of procuring an order of arrest should contain a statement of the evidentiary facts, from which the fact sought to be established should be inferred [17 Abb., 163; 4 Rob., 657], such statement is not indispensable, especially where the fact is positively averred, and it is not impossible that the affiant had personal knowledge of its truth. [16 Abb., 297, n.; 3 Abb. Pr., N. S., 122.] Supreme Ct. Sp. T., 1874, Evans v. Holmes, 46 How. Pr., 515.
- 2. Even if the general averment is made on information and belief, it does not necessarily follow that the order of arrest must be vacated. The motion to vacate will be denied unless the defendant expressly denies under oath the truth of the averment in question. [9 Abb., 106; 5 Rob., 602; 3 Abb. N. S., 123]. The defendant, upon a notice to vacate an order of arrest, may elect whether he will informally de-

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mur to the plaintiff's case set forth in the original affidavit as insufficient in law to warrant the arrest, or raise issues of fact, and proceed to an informal trial on affidavit. But he can not do both by denying a portion of the facts set forth in plaintiff's affidavit. and prevent the plaintiff from introducing affidavits strengthening his case, by alleging that he has not controverted the general averment. Ib.

- 3. Although mere factors or agents are liable to arrest in an action by the principal for moneys received by them, yet where the transactions are under a special contract by which a banker discounts drafts drawn by the consignor on the factor, and receives the factor's acceptance of the consignor's drafts upon an agreement to apply the first proceeds of the consignment to the payment of the draft, the factors, if they retain a special property, are not to be regarded as holding the proceeds in a fiduciary capacity. And in an action on the acceptances they are not liable to an arrest. Ct. of App., 1873, German Bank v. Edwards, 53 N. Y., 541.
- 4. A complaint showing that defendant, as assignee in trust, received a sum of money of which plaintiff was by terms of the assignment entitled to a share, and that, although requested, defendant had refused or neglected to pay him any part thereof, is an action for money received in a fiduciary capacity within the rule allowing an arrest; and the fact that the answer is such as to render it necessary to take an account for the purpose of ascertaining the amount to which plaintiff was entitled, does not affect the right to arrest. [Explaining 40 N. Y., 124.] Ct. of. App., 1873, Roberts v. Prosser, 53 N. Y., 260; reversing 4 Lans., 369.
- 5. In an action upon an acceptance by defendants of a draft drawn on them by third persons and discounted by plaintiffs, an order of arrest can not be granted on the sole ground that defendants had, as plaintiff's agents, collected money for plaintiff which they failed to pay over but converted to their own use. Although the fund thus collected may have been represented by the acceptance, the action, being in form solely upon the acceptance, can not, for the purpose of sustaining the arrest, be deemed to be really for the recovery of the moneys collected. Ct. of App., 1873, Farmers' & Mech. Nat. Bank v. Sprague, 53 N. Y., 605.
- Arrest can not be ordered unless defendant is liable thereto on all the causes of action. Bowen v. True, 53 N. Y., 640.
- 7. Where a person is brought by fraud within the jurisdiction of the court, creditors who did not participate in the fraud may serve summons upon him, and in the action thus instituted, may resort to all the auxiliary remedies which the law gives,—e. g., arrest. Adrience v. Lagrave, Ante, 272.

ASSESSMENTS.

- 8. The presumption being in favor of the jurisdiction of the court, if the creditor who effects such arrest explicitly denies in his affidavit that he was a party to the arrangement by which defendant was wrongfully brought within the jurisdiction, the defendant's motion to set aside the arrest should be denied. Ib.
- 9. Plaintiff's attorneys unjustifiably obtained a warrant of arrest against defendant in Philadelphia, upon which, to avoid scandal and disgrace, defendant consented to come to New York. Immediately upon his arrival he was arrested in a civil suit. Held, that having been induced by subterfuge to come within the jurisdiction of this court, the arrest here was void. [45 How. Pr., 305.] 1873, Smith v. Meyers, 1 Supreme Ct. (T. & C.), 665.
- A person arrested in a civil action for fraud or conversion, will not be discharged on the ground of infancy. [Following 5 Hill, 392; 1 Daly, 334; and overruling 5 Sandf., 224.] Supreme Ct., Sp. T., 1873, Schuneman v. Paradise, 46 How. Pr., 426.
- 11. Order will not be reversed where defendant does not explain or deny the allegations of plaintiff's affidavit, showing a prima facie case. 1872, Kern & Rachow, 34 N. Y. Superior Ct. (2 Jones & S.), 239.
- 12. The agents of the American Society for the Prevention of Cruelty to Animals, duly designated by the sheriff, may arrest, without warrant, a person found by them in the very act of over-driving a horse which appeared at the time to be incapable of doing the work, and was being over-driven in such a manner as to involve cruelty. Stage Horse Cases, Ante, 51.
- 13. Such an arrest, without warrant, can only be made when the offense is committed in the presence of the officer. Ib.

ASSESSMENTS.

- 1. Jurisdiction to proceed with a local improvement, having been acquired by publication of a resolution of the common council, the provisions of the statute relating to the form or manner of execution, or incident thereto, are directory; and the assessment for such improvement is valid, although it was never confirmed by the common council, but by the board created by Laws of 1861, ch. 308; although no designation of corporation papers was ever made in compliance with Laws of 1870, ch. 383, § 1., and no notice of the assessment under Laws of 1841, ch. 171, § 1, was ever published. 1873, Petition of Folsom, 2 Supreme Ct. (T. & C.), 55.
- 2. It seems that where the notice was published in several daily and weekly newspapers, petitioners must show, to entitle them to relief,

ATTACHMENT.

that they did not see the notice, and were prejudiced by want thereof. Ib.

ESTOPPEL; EVIDENCE, 50; NEW YORK, 5-7; TAXES

ASSIGNMENT.

- A cause of action for deceit with pecuniary injury is assignable.
 Abb. N. S., 331; 19 N. Y., 464.
 1873, Woodbury v. Delap, 1 Supreme Ct. (T. & C.), 20.
- 2. The rule that the assignee of a judgment takes it subject to equities, and can not enforce it if it could not be enforced by the assignor at the time of the assignment [3 Barb. Ch., 621],—applied. Waring v. Loder, 53 N. Y., 581.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

- The Laws of 1860, ch. 348, regulating manner of making assignments for benefit of creditors, is not an insolvent law, and is not interfered with by the bankrupt law. 1873, Thrasher v. Bentley, 2 Supreme Ct. (T. & C.), 309.
- 2. The assignment is not rendered void by failure of the assignee to file a bond in exact conformity with the statute. Until the bond is filed the assignee has no authority to sell, dispose of, or convert to the purposes of the trust, any of the assigned property. Collecting the choses in action is not a conversion. Ib.

ASSOCIATION.

 An association can not expel a member because he does not appear to answer charges, and without proof of the charges. Supreme Ct., 1873, People ex rel. Corrigan v. Father Mathew Benev. Soc., 65 Barb., 357.

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- Proof of an admission by a person in debt that she had disposed
 of her property, and was going to Canada to live, Held, sufficient
 evidence of a disposal of her property with intent to defraud creditors, to warrant the issuing of attachment against her. N. Y.
 Com. Pl., 1871, Van Loon v. Lyon, 4 Daly, 149.
- 2. Proceedings under attachment are ineffectual to reach a debt, due on account to the defendant in the attachment, where the sheriff fails to give notice of the levy to the debtor. Supreme Ct., 1872, Clark v. Warren, 7 Lans., 180.
- A chose in action is incapable of seizure by the sheriff. [Code, \$235, 236; 11 How., 520; 41 N. Y., 210; 3 Sand. S. C. R., 692.]

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- It is, it seems, excepted from sale by section 237 of Code, subdivision 2. Ib.
- 4. Under § 235 of Code of Pro.,—as to attachment of property, &c., of a debtor in hands of third person,—a general notice that all the property, debts, &c., of defendant in the action, in possession or control of the person served with the notice, and with a copy of the attachment, is sufficient. O'Brien v. Mechanics' & Traders' Fire Ins. Co., Ante, 222.
- 5. It is optional with the sheriff whether he will limit his levy, by specifying in the notice particular property. Ib. Drake v. Goodrich, 54 Barb., 78, and Clark v. Goodrich, 41 N. Y., 210, explained. Ib.
- 6. Under § 241 of Code of Pro., as amended in 1869, when an undertaking is given to obtain the discharge of an attachment, it is the duty of the sheriff, notwithstanding the ex parte approval of an undertaking by the court, to retain possession of the property until there has been an opportunity for the justification of the sureties. Moses v. Waterbury Button Co., Ante, 205.
- 7. This is matter of substantial right, which plaintiff does not waive by a verbal consent to the entry of the order for discharge; and such an order, allowing a surrender of the property without a justification of the sureties or a waiver of the right to object, is erroneous, and will be corrected on motion. Ib.
- 8. The sureties, on an undertaking given to discharge an attachment, assume the payment of the debt alleged, when established by process of law, and become debtors of the plaintiff as soon as judgment is obtained. It is, then, immaterial whether or not the debtor has been discharged by subsequent proceedings in bankruptcy. 1873, Holyoke v. Adams, 2 Supreme Ct. (T. & C.), 1.
- 9. The court has power to regulate and control all provisional remedies [Code, §§ 241, 230, 174; 61 Barb., 266.], and may, therefore, fix the amount of the undertaking on attachment, and may require an additional undertaking. 1874, Whitney v. Denuiston, 2 Supreme Ct. (T. & C.), 471.
- 10. This court has jurisdiction to entertain an action, brought on a bill of exchange against an insolvent national bank of another state, and issue an attachment against property of such bank, situated in this state. [50 Barb., 339.] Supreme Ct., 1873, Allen v. Scandanavian Nat. Bank, 46 How. Pr., 71.
- 11. A receiver of the assets of a national bank of another state, appointed by the comptroller of the currency, has no *status* to move to vacate an attachment issued and levied in this state on property of the bank here. [37 N. Y., 525.] Ib.
- 12. M. brought an action against defendants, and levied an attach-

ATTORNEY AND CLIENT.

ment upon their property. Subsequently A., a special partner, brought his action for dissolution of the copartnership, and made application for a receiver, which was granted. A decree was entered dissolving the copartnership. Subsequently a petition in bankruptcy was filed, and defendants declared bankrupt. Application was made for the receiver to turn over the assets to the bankrupt court. Held, that this court, by its receiver having first obtained possession, could not be interfered with by any other court [20 How., 583]; that by his attachment M. obtained a valid lien and a preference over the other creditors. [9 Alb. L. J., 77.] 1874, Appleton v. Bowles, 2 Supreme Ct. (T. & C.), 568.

ACTION, 4; BANKRUPTCY, 4; CONTEMPT, 3; COSTS, 15; COURT OF COMMON PLEAS; DISTRICT COURT, 1, 2; EVIDENCE, 4; JUSTICE'S COURT, 12, 13; SURROGATES' COURTS, 9.

ATTORNEY AND CLIENT.

- 1. Although an attorney has a lien on a bond and mortgage in his hands for foreclosure, not only for costs of the suit, but for what is due him from the owner of the securities for other professional business, one member of a firm of attorneys has not a lien for an individual demand, as against such securities received by his firm Ct. of App., 1873, Bowling Green Savings Bank v. Todd, 52 N. Y., 489; affirming 64 Barb., 146.
- 2. Retaining an attorney to prosecute an action, and its commencement by him, gives him no lien upon the possible recovery, such as to enable them to prevent a voluntary settlement between the parties, without payment of the attorney. Ct. of App., 1873, Pulver v. Harris, 52 N. Y., 73; affirming 62 Barb., 500.
- 3. If a judgment for damages for assault and battery is assigned after recovery, and is subsequently reversed on appeal, the assignment becomes inoperative; and a provision in the order of reversal, that a new trial be had, and that costs should abide the event of such trial, does not aid the assignee's claim, even though he be an attorney who took the assignment as security for his costs. 1b.
- 4. An agreement between attorney and client that such attorney shall receive as his compensation a share of the property recovered, is lawful. [Code, § 303; 23 Barb., 420.] But such agreements are regarded with suspicion by the courts, and if the meaning be not clear, a construction most favorable to the client will be put upon it. [38 N. Y., 335; 26 How., 213; 39 Barb., 513.] 1874, Burling r. King, 2 Supreme Ct. (T. & C.), 545; S. C., 46 How. Pr., 452.

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- 5. All presumptions are in favor of the client, and there must be clear proof not only of the execution of the instrument, but of its integrity and entire fairness outside of the paper itself. [40 Barb., 521; 34 N. Y., 167; 38 N. Y., 342; Strong's Eq. Juris., § 308-234; 16 N. Y., 285; 57 Barb., 543.] Ib.
- 6. The fact that one of a firm of attorneys was not admitted to practice in a particular court, does not preclude the firm from recovering compensation from their client for services in an action in such court. And it seems that the rule would be the same if none of the attorneys had been admitted, if they did not violate any express provision of the statute in rendering such services. Ct. of App., 1873, Harland v. Lilienthal, 53 N. Y., 438.
- Measure and evidence of attorney's services. Disborough v. Herdman, 52 N. Y., 660.
- 8. An attorney liable to the sheriff for his poundage on an execution. [5 Johns., 252; 9 Id., 114; 4 Paige, 510; 1 Kern., 408.] 1873, Campbell v. Cothran, 1 Supreme Ct. (T. & C.), 70; S. C., less fully, 65 Barb., 534.
- 9. An attorney endeavoring to enforce payment of his client's judgment, from a third person, who holds a fund which is claimed by the judgment debtor, may be deemed as acting adversely to such third person; and is not necessarily chargeable with fraud merely because he obtains payment by order of the court, while omitting to disclose to the court the existence of a rival claim to the same fund, made by a stranger to the proceedings. Wilmerdings v. Fowler. Ante, 86.
- 10. A conveyance, intended by both parties to hinder and delay the creditors of the grantor, can not, even as against the grantor, be sustained in favor of the grantee or his assignee with notice, by reason of the fact that the grantee was the attorney and counsel of the grantor, and as such advised and received the conveyance. Goodenough v. Spencer, Ante, 248.
- 11. Attorney and client, when parties to such a transaction are not regarded as in pari delicto; but the client will be relieved if it can be done without injury to an innocent purchaser. Ib.
- 12. Receipt of one of two trustees for trust money paid him by the trustees' solicitors not a protection when money is lost by insolvency of such one. Lee v. Sankey, 5 Eng. R. (Mouk's Ed.), 808; L. R., 15 Eq. Ca., 204.
- Whether solicitor can be ordered to disclose address of client (not, a ward of court.) Heath v. Crealock, 5 Eng. R. (Moak's Ed.), 836; L. R. 15; Eq. Ca., 257.
- CONTEMPT, 3; EVIDENCE, 52; FORMER ADJUDICATION; WITNESS, 10, 11.

BANKBUPTCY.

ATTORNEY-GENERAL.

The attorney-general, having power under Laws of 1868, ch. 869
 p. 2074, to bring and maintain such actions as he may deem advisable, for certain purposes, has implied power, after a decision adverse in such an action, to waive the right to appeal. Ct. of App., 1873, People v. Stephens, 52 N. Y., 306.

BAIL.

Practice as to exonerating bail. Star Fire Ins. Co. v. Godet, 34
 N. Y. Superior Ct. (2 Jones & S.), 359.

BANKRUPTCY.

- The creditor of a corporation is not precluded from maintaining a suit against it by having proved his claim in bankruptcy. Ct. of App., 1873, Ansonia Brass, &c. Co. v. New Lamp Chimney Co., 53 N. Y., 123; affirming 64 Barb., 435.
- 2. Upon a continuing and terminable contract,—e. g., for compensation for storage, in the nature of rent,—a bankrupt's discharge exonerates the debtor from so much of the compensation as had accrued at the time of filing the petition, but not from that which accrues subsequent to the filing of the petition. Such a claim for compensation thereafter to accrue was not, at the time of filing the petition, a liability of any sort, present or contingent. [4 Den., 573.] Ct. of App., 1873, Robinson v. Pesant, 53 N. Y., 419.
- 3. B. & N., railroad contractors, having a claim against a railroad company, which the company refused to pay, filed a mechanic's lien, under ch. 529, Laws of 1870, and proceeded to foreclose the same, and also filed a petition in bankruptcy against the company. Subsequently another contractor, who was not a party to either of the above actions, having a claim against the company, commenced this suit for an equitable adjustment of the claims of the contractors, and that B. & N. be restrained from proceeding in either of the suits. Held, that the claim of B. & N. could be contested in the proceeding to enforce the lien [L. 1854, p. 1086, ch. 402, § 13, 14; L. 1858, p. 324; L. 1870, p. 1283]; therefore an injunction would not issue to restrain the suit for the foreclosure of the lien. That this court, acting upon the parties, could restrain the bankruptcy proceedings [3 Edw. Ch. 203, 205; 3 How. (U. S.), 292; 17 How. Pr., 464; 6 Abb. Pr., 239], and should do so in this case, when lasting injury would otherwise result to a third person. 1873,
- 4. A creditor having a lien by attachment upon his debtor's goods,

Pusey v. Bradley, 1 Supreme Ct. (T. & C.), 661.

BUILDING LAWS.

which has been dissolved by giving the undertaking prescribed by law, acquires a vested right which is not invalidated under the fourteenth section of the bankrupt act, by proceedings against his debtor in bankruptcy commenced more than four months after the attachment was levied. 1873, Holyoke v. Adams, 2 Supreme Ct. (T. & C.), 1.

- 5. Such right, however, is subject to the right of the debtor to substitute the undertaking prescribed by law. Ib.
- 6. Whether, under the bankrupt law, a judgment necessarily merges the original cause of action,—Query? Shuman v. Strauss, 34 N. Y. Superior Ct. (2 Jones & S.), 6; compare 52 N. Y., 404.

COMPLAINT 2 · COSTS, 13-15; DISCHARGE; JURISDICTION, 4.

BOUNDARIES.

1. An action lies in equity in case of a confusion of boundaries of land, to ascertain and fix the boundaries, and prevent a multiplicity of suits, when, by the deeds, or by the owners or occupants of the lands, the boundaries can not be ascertained with reasonable certainty by one party alone, or except by the judgment or opinions of men after an examination of the deeds and the premises with a surveyor, aided perhaps by the examination of witnesses. And it is not essential that the confusion should have happened through the fault of the defendant. So held in a case of peculiar equity and necessity [reviewing authorities]. Supreme Ct., Sp. T., 1872, Boyd v. Dorvie, 65 Barb., 237.

BUILDING LAWS.

1. Under the New York building laws, which provide that judgments for penalties, &c., shall be a lien upon the premises named in the complaint, to date from the filing of a lis pendens, which lien may be enforced against the said property in every respect, notwithstanding the same may be transferred subsequent to the filing of said notice [Laws of 1871, p. 1334, ch. 625, § 33], the judgment is like other judgments, subject to all prior liens, or at least to such as attach before the filing of a notice. And the transfer subsequent to the filing of a notice, contemplated by the statute, does not include a judicial sale for the satisfaction of a lien prior to the judgment. Where the lien is filed after the commencement of the foreclosure of a prior mortgage and the filing of a notice therein, the remedy upon a judgment in the proceeding under the statute, is limited to the surplus money arising upon the sale in foreclosure. Ct. of App., 1873, Mitchell v. Smith, 53 N. Y., 413.

CANALS.

The provision of Laws of 1859, ch. 252, § 4, that whenever the canal board shall, on appeal, reverse or modify an award, they shall state the grounds of such reversal or modification, &c., is not merely directory, but peremptory; and a compliance with it is essential. Supreme Ct., 1872, People ex rel. Seymour v. Canal Board, 7 Lans., 220.

CASE.

- 1. On an appeal from a judgment rendered by a judge without a jury, or by a referee, a case containing an introductory statement of the proceedings in the cause, the notice of appeal, the judgment record containing the referee's report, and the exceptions filed thereto, is sufficient, if the appellant merely desires to review the conclusions of law from the facts found by the referee. [47 N. Y., 670.] 1873, Davie v. Van Wie, 1 Supreme Ct. (T. & C.), 530.
- Where an appeal is based on the ground of an improper rejection of competent testimony, the case must show clearly that there was an exception taken to such rejection, or that the appellant was injured thereby. N. Y. Com. Pl., 1872, Carey v. Carey, 4 Daly, 270.
- One who proposes an unreasonable number of findings will not be heard to object, that the court did not discern the materiality of some of them. Quincey v. Young, 53 N. Y., 504.

CASES OF ACTION.

- 1. The rule in this State, that a vendor who contracted in good faith, and has not refused to perform, is not liable in damages for failure of power to convey title,—applied, against a purchaser who sought to recover for improvements made by him. Supreme Ct., Sp. T., 1873, McMulkin v. Bates, 46 How. Pr., 405.
- An action for the entire damages, including the prospective damages, can be sustained against the executor of a person who contracted to support plaintiff for life. [8 Barb., 412; 35 Id., 873.] Supreme Ct., 1873, Schell v. Plumb, 46 How. Pr., 11.
- The Northampton tables are evidence, and are admissible to enable the jury to estimate the amount of damages in such a case. Ib.
- 4. An action for the conversion of a deposit of money, may be brought as for money had and received, without waiting for the formality of a sale, or an actual application of the money to defendant's own use. Supreme Ct., 1873, Tryon v. Baker, 7 Lans., 511.
- For the purpose of satisfying a pledgee's claim, and sustaining an action for conversion of the pledge, a payment of the claim, on ac-

count of the debtor, although without his knowledge, is equivalent to payment by himself. Roberts v. Berdell, Ante, 177.

- 6. When the pledgor, after learning of such a payment, applied repeatedly for redelivery of the pledge, and was put off by the pledgee, and finally disavowed the alleged payment, and made a formal demand of the pledge, coupled with an offer to pay what was due, but without a tender, and the pledgee then for the first time absolutely refused to deliver the pledge;—Held, that an action for conversion could be sustained on proof that the payment was actually previously made. Ib.
- Equity will relieve against forfeiture when ample compensation can be made in damages; and the measure of compensation is the amount secured to be paid with interest. N. Y. Superior Ct., Sp. T., 1873, Giles v. Austin, 46 How. Pr., 269.
- Clauses of re-entry in leases are securities for payment of money; and precise compensation can be made in such cases, and they are relievable in equity. [6 Duer, 262.] Ib.
- 9. A supplemental answer in an ejectment suit, setting up payment since the commencement of the action, is not a matter of absolute right, but one of discretion [16 Abb., 269], and the defendant, instead of applying for leave to put it in, has his remedy by an action in equity. [6 Duer, 275; 44 Barb., 138.] Ib.
- 10. A false and fraudulent affirmation, made by a seller to two or more joint purchasers, is a joint and several tort to each, and if a defendant, liable to several, therefore settles with one, the action is thereby severed, and the other injured parties may maintain their actions for damages. [6 Mass., 460.] 1873, Woodbury v. Delap, 1 Supreme Ct. (T. & C.), 20.
- 11. Several persons engaged in the same business, each deposited money or securities to the amount of \$1,000 in the hands of a person designated by them, on an agreement of the latter to deposit the whole fund in a trust company. Held, that, on his breach of his duty to deposit, a single depositor, after giving notice terminating the agreement, could maintain a separate action to recover his own deposit from the custodian. 1872, McCullough's Lead Co. v. Strong, 35 N. Y. Superior Ct. (3 Jones & S.), 21.
- 12. A railroad company is not liable in damages for a wanton and unprovoked injury to a passenger committed by a fellow passenger, unless it be shown that the servants of the company knew that the wrong-doer was an unsafe or dangerous man, and that there was reason to apprehend his injuring other passengers. Putnam v. Broadway, &c. R. R. Co., Ante, 383.
- 13. Mere intoxication is not sufficient to make it the duty of a conductor to expel a passenger from a public conveyance. Ib.

- 14. The fact that the blow causing the injury was struck with a car hook belonging to the car is not sufficient to render the company liable, without proof of negligence or wrong on the part of the servants and agents of the company. *Ib*.
- 15. After action brought by plaintiff to enjoin defendants from taking his land, proceedings were taken to acquire the lands, and damages were assessed and paid by defendant. Held, that plaintiff's action for damages already accrued was not thereby barred. 1873, Calkins v. Bloomfield & Rochester Natural Gas Light Co., 1 Supreme Ct. (T. & C.), 541.
- 16. The fact that a person, injured by a dangerous machine negligently left unguarded, was technically a trespasser, when injured, does not necessarily preclude the recovery of damages. Mullaney v. Spence, Ante, 319.
- 17. An action lies by a tenant of a part of a building, against his landlord, who occupies other parts, to recover damages for negligence in allowing injurious substances to lead through from defendant's rooms into plaintiff's rooms; and the principle that, as between landlord and tenant, the landlord is not bound to keep in repair, without express contract, does not avail as a defense, if negligence be shown. Stapenhorst v. American Manufacturing Co., Ante, 355.
- 18. In such an action, loss of custom by plaintiff, in consequence of of the latent injuries sustained by goods manufactured by him on the premises, is not admissible, unless alleged in the complaint as special damages. Even gross or reckless negligence does not entitle the plaintiff to have the jury consider the injury done to the business, or the good will thereof, in estimating the damages. *Ib*.
- Against ferryman for negligence. Wyckoff v. Queens Co. Ferry Co., 52 N. Y., 32.
- 20. An action for damages for injuries to lands may be maintained by the plaintiff in ejectment after he has been restored to possession. [36 Barb., 613; 18 Id., 496; 19 Id., 560.] 1873, Pierce v. Tuttle, 1 Supreme Ct. (T. & C.), 139.
- 21. An action for the recovery of specific chattels will lie for things which were part of the realty, but which have been severed therefrom by a wrong doer, and converted to his use; but if plaintiff's only claim to the property severed rests upon his interest in the land from which it was taken, he must show that he was in actual or constructive possession of the land when severance occurred. And such a constructive possession can not arise upon a void conveyance. Ct. of App., 1873, Johnson v. Elwood, 53 N. Y., 431.
- 22. When there is no complete remedy at law, an action in equity may be brought to recover possession of a deed, the evidence of

title to lands. Supreme Ct., Sp. T., 1873, Browne v. Corkran, 46 How. Pr., 427.

- 23. L., the shipper of grain, took for it a bill of lading expressing that the consignment was for account of L., care of N., at Buffalo, and drew a sight draft upon N. for a large sum, and on the draft and bill of lading he borrowed the money to pay for the grain. N., on presentation of the draft and bill, obtained a loan from the plaintiffs by pledging the bill of lading, indorsing it personally and as agent, and with the money thus borrowed he paid the draft. At the same time he signed, as agent, a receipt expressing that the money was an advance on the corn, and that the bill of lading was held by plaintiffs as collateral. On the subsequent arrival of the vessel, the master, by N.'s direction, delivered the grain to the defendants as warehousemen, who thereupon issued a ticket acknowledging its receipt from the master of the vessel, and the master indorsed this receipt to the order of N. The defendants subsequently delivered all the corn pursuant to various orders drawn upon them by N. in favor of third persons. Held, that defendants, not having had notice of the advances made by plaintiffs, were not liable to plaintiffs for so delivering the grain. Hazard v. Abel, Ante, 413.
- 24. Warehousemen who receive from a carrier a cargo of grain, issuing their receipt therefor to the carrier, which the carrier indorses to the person named as consignee's agent in the bill of lading, are not liable in trover, to the consignee, or his pledgee of the bill of lading, for delivering the grain upon the order of such agent, without notice of the pledge. 1b.
- 25. Plaintiffs agreed to sell A. & Co. a cargo of corn. A. took a sample, and plaintiffs took the boat and cargo as directed by A. & Co. to the warehouse of B. & M., warehousemen, to have the corn discharged. The warehouse receipt was made out in the name of A. & Co., and delivered to them by the warehousemen, and they immediately pledged the receipt with C. & Co., as security for a loan made on the faith of it. A & Co. were at the time insolvent, and failed to pay the price of the corn. Held, that the sellers not having informed the warehousemen of their claim, the warehousemen were not bound to protect it; and that the buyer's possession of the receipt was equivalent to possession of the corn, and C. & Co. having made advances on the receipt, in good faith, should be protected. Hoyt v. Baker, Ante, 405.

26. Remedies between stockholder and his customer. 6 Eng. R. (Moak's Ed.), 308, n.

BANKRUPTCY, 2; BOUNDARIES; DEMAND; FRAUD, 2; LIMITATIONS; MAILCIOUS PROSECUTION, 1; NUISANCE, 1; PARTIES, 36, 41, 44, 45; USURY, 3. CERTIORARI.

CERTIORARI.

- 1. A certiorari is not of right, but is a beneficent and important remedy; and although a person having no interest in the subject of litigation, or in the effect of the proceedings, can not claim the writ, yet it is not essential that he be a party to the proceedings in order to entitle him to review them. Thus, where land is sold for non-payment of a tax, and the purchaser takes summary proceedings to dispossess a third person in possession, the original owner may apply for a certiorari to review the proceedings, under the general provision of 2 R. S., 516, § 47, which allows the writ to issue, without defining the persons who may apply. Ct. of App., 1873, People ex rel. Sheridan v. Andrews, 52 N. Y., 445.
- 2. Where the resolution or order of a board of officers is not in compliance with the peremptory provisions of the statute, certiorari is the proper remedy to set it aside, even where the determination of the board is made, by statute, final and conclusive. Supreme Ct., 1872, People ex rel. Seymour v. Canal Board, 7 Lans., 220.
- 3. The fact that since the issuing of the writ, the board, recognizing the invalidity of the decision, has rescinded the resolution by which it was made, can have no effect upon the relator's right to a judicial construction of the act complained of. 1b.
- 4. Where the decision of the board is, by statute, made final and conclusive, the court, in the exercise of its supervising power, is confined to the inquiry whether the board had jurisdiction to perform the act complained of, and whether it has kept within the power given to it by law. It can not look into the merits to sustain the decision, or render judgment on the award. Ib.
- 5. A petitioner for bonding a town for railroad purposes, may bring a certiorari to review the proceedings of the county judge on the petition, which have been illegally conducted. Or it may be brought by the town.* Supreme Ct., 1873, People ex rel. Youmans v. Wagner, 7 Lans., 467; S. C., 1 Supreme Ct. (T. & C.), 221.
- 6. Certiorari brought in the name of a supervisor, may, if the supervisor has no authority, be regarded as his individual proceeding. And so it may be regarded as the proceeding of the town if the individual is not entitled to institute it. Ib.
- When several officers or bodies are required to perform separate acts, which together make up one official transaction,— e. g., where

^{*} The case of People ex rel. Akin v. Morgan, holding that the town is not a proper party to institute proceedings by certiorari, 65 Barb., 473: S. C., 1 Supreme Ct. (T. & C.), 101, is said to have been reversed in the Ct. of App., 2 Id., iv.

CLAIM AND DELIVERY.

assessors, railroad bonding commissioners, and the county clerk, are respectively required to act in the issue of municipal bonds in aid of a railroad, —the writ of certiorari to review the proceedings may be addressed to all of them instead of issuing a separate writ to each body; and each officer or body can return as to the part performed by himself or itself. Otherwise, where the acts of different officers do not form parts of one entire official act. [Overruling State v. Trustees of Rochester, 6 Wend., 546; Matter of Woodbine-street, 17 Abb. Pr., 112.] Supreme Ct., 1873, People ex rel. Davis v. Hill, 65 Barb., 170.

- 8. A certiorari to commissioners of taxes, &c., to review their mode of assessing, will not be quashed, because after service of the writ the commissioners have delivered the assessment rolls to the supervisors. Supreme Ct., 1873, People ex rel. Broadway, &c. R. R. Co., 46 How. Pr., 227.
- Certiorari is not adequate remedy where the assessors tax property
 which is of a nature that is expressly exempted by the statute.
 National Bank of Chemung v. City of Elmira, 53 N. Y., 49; reversing 6 Lans., 116.
- 10. It is not essential that parties opposing proceedings before a county judge should be named in his return to a writ of certiorari, nor does the omission to name them deprive them of rights acquired by their appearance. Supreme Ct., 1873, People ex rel. Youmans v. Wagner, 7 Lans., 467; S. C., 1 Supreme Ct. (T. & C.), 221.
- Certiorari may issue to an officer whose term has expired. [6 How. Pr., 175.]
 Supreme Ct., 1873, People ex rel. Davis v. Hill, 65 Barb., 170.
- 12. The court have a discretion to grant or withold the common-law certiorari [2 Hill, 28], and the court of appeals will not review a dismissal of the writ, ordered by the court below, solely for delay in applying, although the relator may be without other remedy. Ct. of App., 1873, People ex rel. Davis v. Hill, 53 N. Y., 547; affirming 1 Supreme Ct. (T. & C.), 154; S. C., 65 Barb., 435.
- That there is no fixed limit as to the delay for which a writ should be dismissed. Ib.

ABATEMENT AND REVIVAL, 9; APPEAL, 49, 50.

CLAIM AND DELIVERY.

- If sureties, in proceedings of claim and delivery, prove to be insufficient, the sheriff is liable under section 210 of the Code, as they are. Supreme Ct., 1872, Hofheimer v. Campbell, 7 Lans., 157.
- 2. The failure of sureties to justify furnishes satisfactory evidence of their insufficiency, notwithstanding their affidavit to the contrary attached to the undertaking. Ib.

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COMPLAINT.

 An agreement to discharge the sheriff from liability for non-justification of the sureties, upon his delivery to defendant of the property replevied, is illegal and void. Ib.

COMMITMENT.

After a commitment has been adjudged void, on habeas corpus, the
papers on which it was granted are functus officio; and a new motion should be made if a new commitment is sought. People (ex
rel, Walters) v. Conner, Ante, 430.

 The distinction between an informal and an illegal commitment, explained. Shanks' Case, Ante, 38.

CONTEMPT, 1; HABEAS CORPUS; IMPRISONMENT.

COMPLAINT.

- 1. In the complaint in an action against the administrator of a deceased agent, to compel an accounting, &c., the plaintiff may ask judgment against the administrator individually, for the payment of moneys, and the delivery of books and specific property, belonging to plaintiff, which came to the deceased as such agent, and which the defendant has possession of and refuses to deliver. Day v. Stone, Ante, 137.
- 2. This is not joining two causes of action. Ib.
- 3. In an action brought by an assignee in bankruptcy, the courts of a State will take judicial notice of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States, passed March 2, 1867;" and the allegations in the complaint that the insolvents were adjudged bankrupts "pursuant to said act," and "the plaintiff in like manner appointed assignee in bankruptcy of said bankrupts," set out the appointment of the assignee with sufficient particularity. Wheelock v. Lee, Ante, 24.
- 4. A general complaint in an action upon the contract of a married woman, is proper, without alleging the facts showing the contract was one by which she was bound. If the contract is not such an one the objection should be taken by answer. Ct. of App., 1873, Frecking v. Rolland, 53 N. Y., 422; reversing 33 N. Y. Superior Ct., (1 Jones & S.), 499.
- 5. Where it appeared by the complaint and exhibit annexed, that defendant contracted, while a married woman, query whether it was not necessary to allege that she had a separate estate, in order to charge her on her own guaranty in an assignment executed by her. 1872, Schlesinger v. Hexter, 34 N. Y. Superior Ct. (2 Jones & S.), 499.
- 6. Under a revocable contract for the insertion, by an advertising

COMPLAINT.

agent, of advertisements in certain foreign newspapers, Held, that on complaint for the contract price, plaintiffs could not recover for insertion after notice to discontinue was given to defendant; and that the cost of subsequent advertisements, until sufficient time elapsed for stopping the advertising, must be alleged as special damage in order to be recoverable. 1873, Stephens v. Howe, 34 N. Y. Superior Ct. (2 Jones & S.), 133.

- 7. In an action in which the complaint alleges that defendants purchased and sold property for plaintiff, and received moneys for which they neglected to account, a recovery for breach of instructions to buy or sell can not be sustained. 1873, Delevan v. Simonson, 35 N. Y. Superior Ct. (3 Jones & S.), 243.
- 8. A complaint in an action for a divorce, alleging that plaintiff was, at the time of its presentment, an inhabitant of this State, and had been so from the 10th day of September. 1872, and charged the defendant with acts of adultery, committed by defendant with a certain person in the complaint named, at a certain house in Berlin, between the first day of January, 1870, and 1873, is sufficient under the statute. [Laws of 1862, ch. 246, § 1.] 1874, Von Rhade v. Von Rhade, 2 Supreme Ct., (T. & C.), 491.
- 9. To recover mesne profits in an action of ejectment, there must be a separate count therefor in the complaint. But the objection must be taken on the trial, otherwise it will be deemed to be waived. 1873, Seaton v. Davis, 1 Supreme Ct. (T. & C.), 91.
- 10. The complaint in an action in equity to set aside a contract for fraud, need not allege that the plaintiff had tendered back the consideration. An offer to repay it is enough. In such a case the court can compel the parties to do equity between each other. It is only in actions of a legal nature that an averment of tender is necessary. N. Y. Superior Ct., Sp. T., 1873, Dusenbury v. Lehmnier, 46 How. Pr., 417.
- 11. A comptaint alleging that A. being indebted to them purchased property, and took a conveyance in the name of his wife; that he made valuable improvements thereon at his own expense; that he conveyed certain other real estate to his wife through a third party; that such conveyances were made with intent to defraud creditors; that he died insolvent; that defendant, his widow, was appointed administratrix, and had no personal assets to pay debts; and that deceased left no other real property, is sufficient. 1874, Spicer v. Ayres, 2 Supreme Ct., 626.
- 12. As to a portion on the property, a trust was created in favor of A.'s creditors [1 R. S., 747, §§ 51, 52], and an action in equity to enforce the trust could be maintained [15 N. Y., 475; 10 Paige, 562; 32 N. Y., 53.] Ib.

COMPLAINT.

- Defendant being the holder of the fraudulent conveyance, and administratrix, a creditor at large could maintain the action. [1 Russ. & Myl., 281; 11 Ves., 29; 1 Johns. Ch., 306; 6 N. Y., 236; 32 Id., 53; 2 Edw. Ch., 199; 14 How. U. S., 29; 16 Barb., 541.] Ib.
- Complaint to recover back moneys obtained by fraud from the county,—Held, sufficient. Supervisors of Richmond v. Trean, 1 Supreme Ct. (T. & C.), 431.
- 15. A complaint upon a municipal ordinance against depositing refuse in a harbor or channel need not allege that the common council adjudged the place a harbor, &c., within the meaning of the statute under which they acted. Supreme Ct., 1873, City of Ogdensburg v. Lyon, 7 Lans., 215.
- 16. In an action in which the complaint demands a partition, and the ascertainment of division or boundary lines, with a prayer for general relief, if the defendant answers, the court may grant a commission to ascertain the boundaries, although a case for partition be not made out. Supreme Ct., Sp. T., 1872, Boyd v. Dorvie, 65 Barb., 237.
- 17. When a lessor of chattels, having reserved a right to retake possession whenever he deems himself unsafe, sues an officer for seizing them on process against the lessee, it is essential that his complaint allege directly that he deemed himself unsafe. It is not enough to aver that he made a demand expressed to be on that ground. 1873, Hathaway v. Quimby, 1 Supreme Ct. (T. & C.), 386.
- 18. In an action to recover chattels, an averment that defendant detained, &c., the following goods "of the plaintiff's," is a sufficient allegation of ownership. [3 Burrill Pr., 296; 7 Hill, 126; and distinguishing 49 N. Y., 259; S. C., 12 Abb., N. S., 320.] 1873, Simmons v. Lyons, 35 N. Y. Superior Ct. (3 Jones & S.), 554.
- 19. In an action for the possession of chattels, where wrongful taking is alleged, an allegation of demand and refusal is not necessary [42 N. Y., 251]; and if it were, an allegation that the goods were forcibly taken from the plaintiff, is enough. 1873, Simmons v. Lyons, 35 N. Y. Superior Ct. (3 Jones & S.), 554.
- 20. In stating a cause of action against a dentist for unskillfulness in operating on the teeth of plaintiff's minor child, by which her teeth were injured, discolored, and damaged, it seems, that special damages are not essential to be alleged, but they must be alleged in order to be recovered. 1873, Fitch v. Fitch, 35 N. Y. Superior Ct. (3 Jones & S.), 302.
- The complaint in an action for waste, need not, as in trespass for treble damages, refer to the statute. [12 Wend., 70.] 1873, Robinson v. Kinne, 1 Supreme Ct. (T. & C.), 60.

Answer, 5; Costs, 9; Parties, 17.

CONFLICT OF LAWS.

COMPROMISE.

- The plaintiff in an action on a cause of action which is not assignable, may discharge the cause of action without regard to his attorney's claim for costs, unless there is an existing judgment. Ct. of App., 1873, Pulver v. Harris, 52 N. Y., 73; affirming 62 Barb., 500.
- Compromise with one of several joint debtors, valid under the act of 1838, though made in another State. Saxton v. Dodge, 46 How. Pr., 467.
- 3. After judgment recovered against the owner and the occupants, respectively, of a tenement, for injuries suffered by reason of negligence in respect to its condition, two defendants, the occupants, appealed, and the other paid the plaintiff in the judgment a sum less than the judgment, to be released from further liability, and took an instrument which recited the recovery of the joint judgment, the desire of the owner of the premises to compound and compromise, and obtain a personal discharge, without prejudice to the plaintiff's right to proceed on the judgment against the other defendants, and, acknowledging the receipt of a sum less than the judgment, declared the owner exonerated from all individual liability to the full extent authorized by the joint debtor's release act of 1838, but without prejudice to the creditor's rights as against all the other defendants. This instrument was not sealed. Held, that this was neither a technical release, nor an accord and satisfaction, such as to exonerate the other defendants, or their sureties in the undertaking given on their appeal. Irvine v. Milbank, Ante, 378.
- Whether it be a good release under the joint debtor act of 1838, query? Ib.

CONFLICT OF LAWS.

- 1. A married woman, domiciled in another State, may sue here in her own name, in respect to separate property which she had held in that other State pursuant to the laws thereof, to recover damages for loss or injury thereof in this State. Ct. of App., 1873, Stoneman v. Erie Railway Co., 52 N. Y., 439.
- Law of a sister State presumed to be the same as our own. 1872,
 Cohen v. Kelly, 35 N. Y. Superior Ct. (3 Jones & S.), 42.
- Rules as to usurious paper, made, negotiated, payable or sued in different States. Hildreth v. Shepard, 65 Barb., 265.

CONTEMPT.

CONSTITUTIONAL LAW.

- 1. Congress have not power to deprive State courts of jurisdiction of all actions against corporations formed under acts of congress. An action against a corporation is not, as has been held of actions by United States corporations, necessarily a case arising under the law, &c., of the United States. Hence, actions against a national bank may be brought in a State court, unless the cause of action is a case arising under the constitution and laws of the United states. Ct. of App., 1873, Cooke v. State Nat. Bank of Boston, 52 N. Y., 96.
- 2. The legislature may, by special statute, authorize sale of lands of infants, including future contingent interest of persons not in being. But it can not authorize, without consent, the sale of lands in which competent adults have an interest, vested or contingent, except when necessary for payment of taxes, &c. Ct. of App., 1873, Brevoort v. Grace, 53 N. Y., 245.
- 3. The mode of apportioning the expenses of the proceeding, and the mode of conducting the proceedings, who shall be made parties, &c., are questions for the legislature. Ib.

CONTEMPT.

- 1. A commitment for contempt in not delivering possession of property pursuant to order of court, must show on its face that the person committed had possession or control of the property. People (ex rel. Walters) v. Conner, Ante, 430,
- On habeas corpus to discharge the prisoner from detention under a
 commitment which is defective in this respect, the court can not
 supply the defect by resorting to the papers on which the original
 order to give possession was made. Ib.
- The fact that an attorney's claim to a lien on money or securities is made in good faith, is not a ground for refusing to the client the summary remedy by attachment. Ct. of App., 1873, Bowling Green Savings Bank v. Todd, 52 N. Y., 489; affirming 64 Barb., 146.
- 4. It is no defense to proceedings to punish for contempt in disobeying an order, that an appeal is pending (there being no stay); nor is the fact of the party's inability an excuse, where it was caused by his own disobedience. People (ex rel. Day) v. Bergen, Ante, 97.
- 5. Under 2 R. S., 538, § 23,—declaring that when the misconduct complained of consists in the omission to perform some act or duty which it is yet in the power of defendant to perform, he shall be imprisoned only until he shall have performed, &c.,—inability to

CORPORATION.

perform the duty, if resulting from the act or omission of defendant himself, is not a defense. Timpson's Estate, Anto, 230.

APPEAL, 7, 8; HABEAS CORPUS.

CONTRACT.

- 1. In an action on contract, it is not admissible to set up as a counter-claim that plaintiff had fraudulently induced defendant to pay moneys falsely claimed under the contract, in excess of the true value of the work, and to demand a repayment. To render these facts available as a counter-claim, the tort must be waived, and the recovery of the moneys overpaid be sought as on an implied contract, and the answer must set forth facts showing defendant's election to proceed on the implied contract, and not for the wrong. Berrian v. Mayor &c. of N. Y., Ante, 207.
- 2. Pending litigation in the U. S. supreme court in reference to the validity of legal tender, an agreement was made that if the decision should amount to a reversal of the decision in Hepburn v. Griswold, one of the parties to the contract should refund a certain sum. The U. S. supreme court reiterated the rule in Hepburn v. Griswold, and the money was paid accordingly; but the court subsequently granted a reargument and reversed the decision. Held, that the payment could not be recovered back, for it was made on the happening of the contingency contemplated, and voluntarily, and not under mistake. Supreme Ct., 1873, Doll v. Earle, 65 Barb., 298.
- 3. Under a contract, "that if it shall at any time hereafter be adjudged by the supreme court of the United States, and become the law of the land," that a payment made at the time of making the contract ought to be in gold, then, "that on such decision being made and becoming the law of the land" the parties should settle a claim accordingly,—Held, that a single decision, made in an action pending when the contract was made, was conclusive on the parties to the contract; and their rights were not affected by a subsequent contrary decision by the same court in another case. Ct. of App., 1373, Woodruff v. Woodruff, 52 N. Y., 53.

Parties, 15-23, 33, 34.

CORPORATION.

A corporation having obtained leave to plead, can not be heard to deny its corporate existence; nor having been served and pleaded to the merits, can it require the plaintiff to prove its corporate

existence. 1873, Root v. Great Western Railway Co., 1 Supreme Ct. (T. & C.), 10.

CONSTITUTIONAL LAW, 1; EVIDENCE, 34; PARTIES, 33-35; REMOVAL OF ACTIONS, 5.

- 1. In an action against two defendants for recovery of specific personal property, where both appear and answer by the same attorney, they are not entitled to separate bills of costs, although they put in separate answers, and one has a dismissal of the complaint, and the other a judgment in his favor for the return of the property. Heye v. Robertson, Ante, 194.
- 2. Under section 306 of Code of Procedure, allowing costs in certain actions in the discretion of the court, it is not for the court to determine what costs shall be awarded, nor whether there shall be one or more bills, but this is to be decided by the taxing officer in the first instance. 1b.
- 3. Under section 385 of Code of Procedure, as amended in 1851 and 1856, the costs which plaintiff is entitled to, if he fails to obtain a more favorable judgment than that offered him, are those of proceedings prior to the offer; and all costs which accrued subsequently are to be taxed in favor of defendant. Magnin v. Dinsmore, Ante, 331.
- 4. The costs intended by this division include disbursements. Ib.
- 5. In an action by a landlord against a tenant for damages by waste, when plaintiff's title to the premises is alleged in the complaint, and the answer is a general denial, title is in issue within the meaning of section 304 of the Code. 1873, Dempsey v. Hall, 35 N. Y. Superior Ct. (3 Jones & S.), 201.
- 6. The voluntary appearance of defendants by attorney, is equivalent to personal service, and entitles the plaintiff to costs of service under section 307 of the Code. Buffalo Superior Ct., 1873, Schwinger v. Hickox, 46 How. Pr., 114.
- 7. In an action at law, where an equitable defense has been successfully interposed, neither the court nor the referee has discretion in regard to costs. [51 Barb., 195; 40 N. Y., 509.] Supreme Ct., Sp. T., 1873, Lanz v. Trout, 46 How. Pr., 94.
- 8. Where a party is clearly entitled to costs, a judgment entered therefor will not be set aside, although improperly entered. [1 Supreme Ct. (T. & C.), 121.] Ib.
- 9. In an equity action costs are in the discretion of the court, and where they are not awarded by the referee who tries the cause, they can not be taxed, or entered in the judgment. [3 Keyes, 614;

- 17 How. Pr., 211; Code, § 306.] Supreme Ct., Sp. T., 1873, Phelps v. Wood, 46 How. Pr., 1.
- The complaint is the proper pleading from which to determine the nature or character of the action. [40 How. Pr., 194.] Ib. Supreme Ct., Sp. T., 1873, Lanz v. Trout, 46 How. Pr., 94.
- 11. H. brought an action against G., D. and others to set aside a conveyance as fraudulent, which was dismissed with costs to D. and G. as against H., and judgment entered for such costs. Subsequently G. sold the real estate to D., and H. assigned his claim to plaintiff, who commenced this action upon the same subject as the former one. Held, that this action should be stayed until the costs of the former action were paid. [6 Hill, 372; 1 N. Y. Supreme Ct. (T. & C.), 259.] 1873, Hill v. Grant, 2 Supreme Ct. (T. & C.), 467.
- 12. An action in the nature of an action of quo warranto, to determine the title to an office, is a civil action, in which the prevailing party is entitled to costs, and an exception lies if they are refused. Ct. of App., 1873, People ex rel. Furman v. Clute, 52 N. Y., 576; modifying 50 N. Y., 451.
- 13. If the plaintiffs, the people, recover judgment against the defendant on one issue, namely, that he is not entitled to the office, costs should be awarded against him, although the judgment also determines that the relator, the adverse claimant, was not entitled. Ib.
- 14. An assignee in bankruptcy is "a trustee of an express trust and a person expressly authorized by statute to sue," within section 317 of the Code. That section is not confined to cases in which the trust fund is under the control of the court in which the trustee prosecutes his action. Ct. of App., 1873, Reade v. Waterhouse, 52 N. Y. 587; reversing 35 N. Y. Superior Ct. (3 Jones & S.), 78; and 12 Abb. Pr., N. S., 255.
- 15. It seems, that under section 121 an assignee, &c., is not to be personally charged with costs which accrued before the assignment. Ib.
- 16. It seems, that the remedy by attachment against an assignee pendente lite, for costs given by section 321 of the Code, does not apply to assignees in a representative capacity who are otherwise provided for by section 317. 1b.
- 17. It seems, that under section 321 of the Code,—declaring that an assignee, &c., of the cause of action pending the suit shall be liable for the costs in the same manner as if he were a party,—an absolute assignee is liable, irrespective of the question whether he ever took any part in prosecuting the action. Dowling v. Bucking, Ante, 190.
- That section, however, does not render liable a person who merely takes an assignment of the claim as collateral security. Ib.

- 19. An offer to allow judgment, under the provisions of the Code, must be unconditional and unqualified; but the making and acceptance of the offer does not preclude the court from granting an allowance. 1871, Coates v. Goddard, 34 N. Y. Superior Ct. (2 Jones & S.), 118.
- 20. In an action to restrain an alleged infringement of a trade-mark, if plaintiff only obtains an injunction without recovering any damages, there is no basis on which the court can make an allowance additional to costs. Ib.
- 21. Under the provisions of the Code (as amended since the cases of Osburn v. Betts, 8 How. Pr., 31; Weeks v. Southwark, 12 Id., 170; and Buchanan v. Morrell, 13 Id., 296,) an extra allowance is authorized in all cases which are difficult and extraordinary when a defense has been interposed and a trial had. Ib.
- 22. The court at special term have power to make allowances to trustees and others acting in a fiduciary capacity, for all expenses necessarily incurred in the faithful performance of their duties, including counsel fees; and the power to do this is independent of the statutory provisions relating to costs. This rule extends to actions by executors for the construction of a will, although the accounts must be rendered to the surrogate, and passed on by him. Ct. of App., 1873, Wetmore v. Parker, 52 N. Y., 450; affirming 7 Lans., 121.
- 23. The "further allowance" to be granted to a party under section 309 of the Code of Procedure, can only be allowed to parties who are entitled by right to the costs provided for in section 307. Devlin v. Mayor, &c. of N. Y., Ante, 31.
- A defendant who obtains a judgment againt a co-defendant does not recover costs as of course. 1b.
- 25. A party claiming to be entitled to a share in a certain fund, brought an action to recover his share, and joined as defendants all other parties claiming shares in the fund, and he and such defendants recovered judgment for their shares. Held, that the further allowance of costs to be allowed to the plaintiff under section 309 of Code of Procedure, could not be computed on the whole fund, but only on his share. And that the defendants who had succeeded in proving their right to a share in the fund, were not entitled to any costs. Ib.
- 26. Meaning of the words "recovery or claim" and "subject matter involved," as used in section 309 of the Code,—considered. 1b.
- 27. A plaintiff is not entitled to an allowance on defeating a counterclaim, in addition to an allowance on his recovery, if the counter-

- claim was defeated by the same evidence which was necessary to sustain his recovery. Ib.
- 28. An application for an allowance can not be granted to the plaintiff upon his obtaining an order granting judgment unless defendant plead over and pay costs. The extra allowances given under the Code are to be part of the final judgment, and an application for them is premature before a final judgment has been recovered. 1873, Merchants' Exch. Nat. Bank v. Commercial Warehouse Co., 35 N. Y. Superior Ct. (3 Jones & S.), 214.
- The rule that where a party does not recover general costs an additional allowance will not be given, [29 How., 97; Id. 101; 30 Id., 148; 5 Id., 242; 2 Sandf., 755; 11 How., 434; 17 Id., 456; 2 N. Y., 570.]—reiterated. 1874, Savage v. Allen, 2 Supreme Ct. (T. & C.), 474.
- 30. An order of the general term, giving costs of appeal to the appellants, does not include the costs of a motion for a new trial below, given by order of court and not by statute; nor the costs in the justices' court in which the action was brought, and in the county court in which it was heard before the appeal to the general term. Supreme Ct., Sp. T., 1873, Lennox v. Eldred, 65 Barb., 526.
- 31. Two bills of costs are not allowed on two separate appeals, from judgment, and from order refusing new trial, taken by same party, and heard together. Supreme Ct., 1874, Bullard v. Pearsall, 46 How. Pr., 383; said to have been affirmed in Ct. of App., Id., 530.
- To the contrary, see (Supreme Ct., Sp. T., 1873), Lennox v. Eldred, 65 Barb., 526.
- 33. When a new trial is granted on the ground that the verdict or report on questions of fact is against the weight of evidence, it must be on payment of costs. Voorhees v. National Citizens' Bank, Ante, 13.
- 34. Payment of costs not required in staying action brought by attorney without authority. Reynolds v. Howell, 6 Eng. R. (Moak's ed.), 129.
- 35. Costs of guardian for infant defendant, appearing by same counsel as plaintiff. Halstead v. Halstead, 2 Supreme Ct. (T. & C.), 673.
- 36. The liability of one standing in position of principal or surety. Steinhart v. Doellner, 34 N. Y. Superior Ct. (2 Jones & S.), 218.
- 37. Where costs are allowed by the court of appeals on appeals to that court from orders, full costs are allowed. Ct. of App., 1873, Brown v. Leigh, 52 N. Y., 78.
- 38. Costs on appeal will not be allowed where all parties are unsuc-

COUNTY CLERK.

cessful on cross appeals. 1873, Kiah v. Grenier, 1 Supreme Ct. (T. & C.), 388.

- 39. The certificate given in pursuance of the act of 1864 [Laws of 1864, 1211, ch. 555, tit. 13, § 6,] to school trustees, exempts them from costs through all stages of the action [38 N. Y., 58; 3 Denio, 175,] including its removal to another court by appeal. 1873, Willey v. Shaver, Supreme Ct. (T. & C.), 324; and see Rawson v. Van Riper, Id., 370.
- Reference to ascertain damages, not a trial within the statute of costs. McMulkin v. Bates, 46 How. Pr., 405.
- 41. Action for specific performance, turning on executor's power to convey, not an action for construction of will, &c., within the statute; further will is only incidentally involved as evidence. McMulkin v. Bates, 46 How. Pr., 405.
- The finder of a chattel has no lien upon it for his costs in prosecuting or defending actions in reference to it. 1878, N. Y. & Harlem R. R. Co. v. Haws, 35 N. Y. Superior Ct. (3 Jones & S.), 372.
- Double costs, when allowed under the statute, are computed on the whole taxed bill, including disbursements. Klinck' v. Kelly, Ante, 135.
- Appeal, 46; District Court, 6; Former Adjudication, 7; Judgment, 13; Marine Court, 2; Mechanic's Lien, 11; New Trial, 17; Schools, 2; Surrogates' Courts, 4.

COUNTER-CLAIM.

- 1. In an action on notes, an answer alleging that they were given in part payment for land, which defendant was induced to purchase by plaintiff's fraudulent representations as to the area of the land, to defendant's damage in a sum stated, for which defendant demands judgment, is a counter-claim and must be replied to. Ct. of App., 1873, Isham v. Davidson, 52 N. Y., 237.
- 2. The decision [33 Barb., 401; 35 N. Y., 269] that in an action by a landlord for rent, the tenant may set up, by way of counter-claim, damages for breach of covenant on the part of the landlord to repair;—followed. 1873, Cook v. Soule, 1 Supreme Ct. (T. & C.), 116.

AMENDMENT, 7; CONTRACT, 1; Costs, 25; LIMITATIONS, 4, 17; SET-OFF, 2.

COUNTY CLERK.

County clerk and his deputy not authorized to take an affidavit of tax assessors. National Bank of Chemung v. City of Elmira, 53 N. Y., 49; reversing 6 Lans., 116.

COURT OF APPEALS.

COURTS.

- 1. When there is a conflict of decision between the courts of New York and those of the United States, the former must be followed by the supreme court of this State, until the U. S. supreme court has reversed the decisions of the court of appeals. 1873, Town of Venice v. Breed, 1 Supreme Ct. (T. & C.), 130; S. C., 65 Barb., 597.
- Military tribunals are within the rule that words spoken in proceedings in court are absolutely privileged. Dawkins v. Ld. Rokeby, 5 Eng. R. (Moak's Ed.), 212; L. R., 8 Q. B., 255.

COURT OF APPEALS.

- 1. The court of appeals possesses no power to review the facts in equitable actions, and determine them according to the weight of evidence. The Code of Procedure was intended to adopt a uniform system, and the introduction of the proceedings, formerly peculiar to equity cases, of trying specific questions of fact by a jury, does not operate to withdraw that class of cases from the application of the other provisions of the Code. The mode of reviewing questions of fact and law was intended to be uniform; and this court is restricted to the review of questions of law, with the single exception of cases where the general term reverses judgments entered on trial by the court or referees upon the facts, and so certify in the order of reversal. Ct. of App., 1873, Vermilyea v. Palmer, 52 N. Y., 471.
- 2. The rule that a party who seeks to reverse in this court a judgment rendered on a referee's report, on the ground that it is not warranted by the facts, must procure such a finding of facts as will show that the judgment is erroneous [46 N. Y., 261], and if no request to find additional facts, and no application for a resettlement of the case was made, the court of appeals can not look beyond the findings to ascertain whether facts were proved which would limit the recovery,—reiterated. Ct. of App., 1873, Fabbri v. Kalbfleisch, 52 N. Y., 28; affirming 2 Sweeny, 252.
- 3. A defendant who has obtained an order for a new trial from which plaintiff appeals to this court, is not limited to the grounds relied on at the general term, but may take any objections which were taken by him at the trial. Ct. of App., 1873, Simar v. Canaday, 53 N. Y., 298.
- 4. The court will not reconsider in the same case a decision made by it after full argument on a former appeal, in the absence of any new evidence or other circumstance to take it out of the rule. Ct. of App., 1873, Justice v. Lang, 52 N. Y., 323.
- 5. The court of appeals is not inclined to review the amount of

CREDITOR S'SUIT.

- trustee's costs, unless unreasonable and arbitrary. Ct. of App., 1873, Wetmore v. Parker, 52 N. Y., 450; affirming 7 Lans., 121.
- 6. Rule 16 of this court,—which provides that either of the judges may make orders to stay proceedings, which, when served with papers and notice of motion, shall stay the proceedings,—does not prevent a judge from staying the filing of a remittitur without service of papers and notice of motion. Cushman v. Hadfield, Ante, 109.
- 7. A single judge of the court may order the filing of a remittitur to be stayed, in whosesoever hands it may be, at any time before it is actually and regularly filed in the court below. Ib.

COURT OF COMMON PLEAS.

- The New York common pleas can not acquire jurisdiction of an action upon contract for recovery of money only, against a non-resident defendant, by service by publication, and by issue and levy of an attachment, as a provisional remedy, upon his property within the county. Towle v. Covert, Ante, 193.
- But in such case the warrant of attachment will not necessarily be set aside, because it may be issued before service of summons. Ib.

COURT OF SESSIONS.

A justice of the peace, while sitting in the court of sessions on the trial of a prisoner, was examined as a witness, and gave material evidence in the case. *Held*, that the court was thereby disorganized and the conviction irregular. 1873, Dohring v. People, 2 Supreme Ct. (T. & C.), 458.

COVENANT.

A covenant not to sue does not operate as a release in favor of those holden jointly with the covenantee, and not related to him as sureties, especially if the covenant reserves the right to proceed against them. Irvine v. Milbank, Ante, 378.

CREDITOR'S SUIT.

- The surplus arising upon a trust for benefit of a debtor created by a third person, can not be reached by an action commenced before such surplus has actually accumulated. Han v. Van Voorhis, Ante, 79.
- 2. A person having a claim against another for moneys intrusted to the latter, and by him embezzled and converted to his own use, is a creditor within the rules making void, conveyances by a debtor with

DAMAGES.

- intent to hinder and delay his creditors. Supreme Ct., 1873, Pendleton v. Hughes, 65 Barb., 136.*
- 3. The plaintiff in a creditor's action may, pending the action, and without waiving or abandoning the lien of his judgment, proceed to sell the debtor's lands on execution upon his judgment. Erickson v. Quinn, Ante, 166.
- 4. Having done so, he may still proceed with the creditor's action, to obtain a judgment removing the cloud upon title. Ib.
- 5. Various remedies of a creditor to enforce his judgment, -stated. I.h.
- 6. A creditor having a judgment lien on two separate parcels of land of his debtor, brought a creditor's suit, and obtained judgment setting aside the debtor's conveyances. Held, that there being no provision in the decree in reference to any equitable right of priority as between the parcels of land, the defendants in the suit, and persons claiming under them, could not subsequently set up any right to have one part first sold in exoneration of the remainder. Any such right should have been set up in the creditor's suit, and provided for in the decree. Ct. of App., 1873, Reynolds v. Park, 53 N. Y., 36.
- 7. An action to set aside a fraudulent conveyance may be maintained by a creditor without judgment, who is otherwise remediless,—e. g., a woman having an unsatisfied order for alimony. [32 N. Y., 53; 2 Seld., 252; 16 Barb., 541; Story's Eq. Jur., §§ 353, 369, 395.] Supreme Ct. [Leonard, Ref.], 1873, Kamp v. Kamp, 46 How. Pr., 143.

DAMAGES.

- In an action for a breach of contract, it is a general rule that the contract furnishes the standard of relief, but compensation will only be given for actual loss sustained. N. Y. Com. Pl., 1871, Doughty v. O'Donnell, 4 Daly, 60.
- 2. But when the party for whom the service is to be rendered willfully delays and embarrasses the performance of the contract by the other party, who endeavors to complete it, and who is finally compelled to abandon the work, the rule that the special contract must control the rate of compensation, no longer prevails, and the party is entitled to the actual value of his services, even though it is in excess of the measure of damages fixed by the contract. Ib.
- 3. Such damages may be recovered in an action on the contract, and plaintiff in such action, after showing that he was prevented from performing by defendant's acts, may show the actual value of services rendered, and recover therefor. Ib.

^{*} Affirmed, it soems, in 53 N. Y., 626, on the opinion of the supreme court.

DAMAGES.

- 4. Exemplary damages may be recovered for the willful act of defendant in so managing his horse and carriage as to bring them into collision with, and cruelly wound and injure, the plaintiff's horse. N. Y. Com. Pl., 1871, Lewis v. Bulkley, 4 Daly, 156.
- 5. Exemplary damages are not given when there has been no intentional offense committed, when a party has only done what he honestly believed to be his duty, and punishment is not deserved; and where the act was done by a servant of the defendant, if exemplary damages could not be recovered against the servant, they can not be recovered in an action against the master. Ct. of App., 1873, Hamilton v. Third Ave. R. R. Co., 53 N. Y., 25; reversing 35 N. Y. Superior Ct. (Jones & S.), 118; S. C., 13 Abb. Pr. N. S., 318; 44 Hov. Pr., 294.
- 6. The measure of damages for conversion of personal property does not as a fixed and unqualified rule extend to the highest market price from the time of conversion to the time of trial. In the case of an action against a broker for an unauthorized sale of stocks purchased for his principal, the advance in market price within a reasonable time for the principal to replace the stock after knowledge of the broker's conversion, is a sufficient indemnity. Ct. of App., 1873, Baker v. Drake, 53 N. Y., 211.
- Measure of damages on refusal to receive merchandise purchased.
 Yorke v. Ver Planck, 65 Barb., 316.
- In cases of personal injury. Brignoli v. Chicago, &c. Rw. Co. 4 Daly, 182.
- In actions for conversion of chattels. Spicer v. Waters, 65 Barb., 227.
- For conversion should not depend upon form of the action, whether for tort or on contract. Ct. of App., 1873, Baker v. Drake, 53 N. Y., 211.
- 11. In trover for conversion. Halstead v. Schwartz, 1 Supreme Ct. (T. & C.), 559; S. C., 46 How. Pr., 289.
- For landlord's breach of agreement to repair. Cook v. Soule,
 Supreme Ct. (T. & C.), 116.
- 13. Against factor on refusal to sell or neglect to sell according to instructions. Whelan v. Lynch, 65 Barb., 326.
- 14. In cases of nuisance. Francis v. Schoellkopf, 53 N. Y., 152.
- For breach of implied warranty of title. Bell v. Dagg, 2 Supreme Ct. (T. & C.), 623.
- On vendor's inability to procure release of inchoate right of dower. Heimburg v. Ismay, 35 N. Y. Superior Ct. (3 Jones & S.), 35.
- For using plaintiff's horse without leave. Clinton v. Townsend,
 Supreme Ct. (T. & C.), 330; S. C., 46 How. Pr., 42.

DEBTOR AND CREDITOR.

- Covenants to pay heavy liquidated damages strictly construed.
 Leggett v. Mut. Life Ins. Co. of N. Y., 53 N. F., 394; reversing 64 Barb., 23.
- Assessment of, in what currency, on gold contract. Stephens v. Howe, 34 N. Y. Superior Ct. (2 Jones & S.), 133.
- Value of pound sterling is \$4.84. Supreme Ct., 1872, Stranaghan
 Youmans, 65 Barb., 392.
- Judgment against surety, when conclusive as to damages, against principal. Dubois v. Hermance, 1 Supreme Ct. (T. & C.), 293.
- 22. The rule that on an assessment of damages upon an undertaking given upon the granting of a temporary injunction, counsel fees upon trial are not allowable, save where they are incurred solely, or principally, because of the injunction,—applies where the court denies the motion to dissolve, for the purpose of postponing the question until trial of the merits of title. Ct. of App., 1873, Disbrow v. Garcia, 52 N. Y., 654.

Animals; Cause of Action, 2, 7, 18; Complaint, 5, 18; Evidence, 15, 16; Pleading, 10, 13, 19; Specific Performance; Trial, 26, 34.

DEATH.

Husband is not "next of kin" to wife, and, therefore, before the act of 1870, was not authorized to share in a recovery of damages for causing her death. Ct. of App., 1873, Suydam v. Smith, 52 N. Y., 389.

DEBTOR AND CREDITOR.

- 1. A mortgage is an alienation pro tanto, within the rule that where property subject to an incumbrance has been alienated in different parcels at different times, sales to pay the incumbrance must be in the inverse order of alienation. But, a mortgage which is a paramount lien over other incumbrances is not within the rule in the case of a sale under such subordinate incumbrances. The rule only applies where there has been an alienation of some interest embraced in the incumbrance. Ct. of App., 1873, Reynolds v. Park, 53 N. Y., 36.
- 2. A creditor having a judgment lien upon two parcels of land of his debtor, brought a creditor's suit to set aside conveyances made by the debtor, and obtained a decree, which he subsequently assigned to one P. Afterward P. purchased one of the parcels, on the foreclosure of a mortgage made subsequent to the judgment, in which foreclosure the creditor was not made a party. Held, that this

DEFAMATION.

operated as a satisfaction of the decree, as in favor of the other parcel, to the extent that the parcel so purchased by him would have been bound to contribute, if anything, to the payment of the decree in exoneration of the other parcel. Ib.

DEED.

- 1. A father on purchasing land directed that the deed name his daughter as grantee; and it was so made and deliverd to him; and on her being subsequently informed by him of the transaction, she approved, and requested him to record the deed, which he promised to do. At his request she subsequently conveyed the land, for a consideration received by him from the grantee. Held, that the deed to her was duly delivered; and she could recover the value of the land from him. Supreme Ct., 1873, Shrader v. Bouker, 65 Barb., 608.
- 2. An escrow, signed, sealed and deposited, upon a valuable consideration, is not revocable by the depositor, except according to the terms of the agreement and deposit. The depositary is as much the agent of the grantee as of the grantor, and is as much bound to deliver the deed on performance of the condition as he is to withhold it until performance. [3 Washb. on Real Prop., ch. 4, § 2, pp. 371, 372, 373; 14 Ohio, 307; 13 Johns., 285; 4 Day, 66; 9 Mass., 307; 6 Wend., 666.] 1873, Stanton v. Miller, 1 Supreme Ct. (T. & C.), 23.

 A deed in escrow, when delivered, relates back to the time of deposit. Ib.

4. If the seal of the corporation is properly affixed to a lease of the corporate property, it is a sufficient execution, without the signature of either member of the committee authorized to execute the same. Supreme Ct., 1872, Union Bridge Co. v. Troy & Lansingburg R. R. Co., 7 Lans., 240.

MISTAKE, 2; QUESTIONS OF LAW AND FACT, 6; SEAL.

DEFAMATION.

The rule that words spoken or written, in a judicial proceeding, by any person having an interest therein, &c., are absolutely privileged, if they were pertinent and material, is applicable, not merely to trials of actions and indictments, but includes every proceeding before a competent court or magistrate in due course of law, which is to result in a decision,—e. g., a complaint to the fire marshal to cause him to institute an inquiry as to the cause of a fire. Newfield copperman, Ante, 360.

DEPINITIONS.

DEFAULT.

- 1. The court has a right to impose, as a condition of opening a default, that there should be an immediate reference, and a speedy trial. Defendant may refuse to accept the order, and allow the judgment to stand, or he may appeal from so much of the order as imposes a condition. 1874, Delany v. Delany, 2 Supreme Ct. (T. & C.), 530.
- A judge at special term has no power to make a waiver of a
 material issue in the pleadings a condition of opening a default
 and inquest taken at the trial term. His power only extends to
 imposing costs, &c. N. Y. Superior Ct., 1873, Horn v. Brennan,
 46 How. Pr., 479.
- Jurisdiction once acquired, is not lost by a premature entry of default, and reference to take proof. [8 Abb., 59; 7 N. Y., 404.] 1874, Von Rhade v. Von Rhade, 2 Supreme Ct. (T. & C.), 491.
- 4. Where after judgment of divorce the plaintiff has married an innocent person, the court, in opening a default, will allow the judgment to stand until the final determination of the action. *Ib*.

 APPEAL, 15.

DEFENSES.

- An agreement for the settlement of an action, with a tender of performance of the terms by defendant, constitute a cause of action in his behalf for specific performance, and when set up by supplemental answer is a good defense to the action. 1873, Kelly v. Dee, 2 Supreme Ct. (T. & C.), 286.
- The rule that the mere pendency of a former suit, though between same parties, is not a legal bar [9 How. Pr., 228,]—reiterated. 1873, Ritter v. Worth, 1 Supreme Ct. (T. & C.), 406. See also Pullman v. Alley, 53 N. Y., 637.
- Nature and limits of the defense that the act of a corporation was ultra vires. Directors, &c., v. Macnabb, 6 Eng. R. (Moak's Ed.), 17 note.
- Answer; Appeal, 27, 28; Another Action Pending; Evidence, 1; Former Adjudication; Injunction, 10; Judgment, 10; Justices' Courts, 2; Pleading; Waste, 3.

DEFINITIONS.

The phrase "existing provisions of law," as used in section 291 of the Code, means law established by the courts as well as by the legislature. 1873, Nelson v. Kerr, 2 Supreme Ct. (T. & C.), 299.

STATUTE, 2.

DEMURRED.

DELIVERY.

Delivery of an instrument not under seal may be made to the party beneficially interested, upon conditions, the observance of which is essential to its validity; and the annexing such conditions is not an oral contradiction of the written obligation, as between the parties to it, or others having notice, though it be negotiable. Ct. of App., 1873, Benton v. Martin, 52 N. Y., 570.

EQUITY, 1.

DEMAND.

- 1. The indorsement of plaintiffs, to certain checks payable to their order, and belonging to them, was forged, and upon such forged indorsement the checks were, in good faith, cashed by A., who, for value, indorsed them to B., who deposited them in his bank C., which collected them, and credited B. with the proceeds. Held, that plaintiffs might sue A., B. and C. for a joint conversion of the checks, without making a demand. N. Y. Com. Pl., 1871, White v. Sweeny, 4 Daly, 223.
- 2. The possession of securities received as collateral to a usurious loan, is not a lawful, but a tortious possession. The title remains in the borrower; and no demand for them is necessary before commencing suit to enjoin their prosecution, or to compel their surrender. Wheelock v. Lee, Ante, 24.
- 3. The rule that in an action to recover specific personal property, a demand before action is necessary to be alleged and proven, where the property came lawfully into the possession of the defendant [1 Keyes, 321; 1 Sweeny, 215; 6 Hill, 613; 32 Barb., 181; 5 Lans., 78; 3 Hill, 348; 49 N. Y., 259]—reiterated. Talcott v. Belding, 46 How. Pr., 419.
- Under, as before, the Code, a demand before suit is not necessary, in order to maintain an action against a sheriff to recover moneys collected by him on an execution. [18 Johns., 133; 1 Wend., 534; 4 Id., 678; 5 Hill, 398; 38 N. Y., 28; 2 Phil. Ev., 390.] 1873, Nelson v. Kerr, 2 Supreme Ct. (T. & C.), 299.

DEMURRER.

The objection that plaintiff has not legal capacity to sue, can not be taken under a demurrer merely assigning as its ground, no cause of action. People ex rel. Lord v. Crooks, 53 N. Y., 648.

PARTIES, 45; PLEADING, 14, 15.

DEPOSITION.

DEPOSITION.

- 1. There being no provision in the statute as to the mode in which witnesses unacquainted with the English language shall be examined, and the commissioner having acted as interpreter, no special instructions in that particular having been given by either party,—Held, that it would be assumed that they meant that he should do so, there being no pretense that he was not able to translate correctly the questions into Spanish and the answers into English, or that he had been guilty of any partiality or unfairness. N. Y. Com. Pl., Sp. T., 1873, Leetch v. Atlantic Mut. Ins. Co., 4 Daly, 518.
- 2. It was agreed that if either commissioner were absent, the examination might be taken before the other. One of the commissioners was at the place where the commission was executed, when it was received, and for some time after, but was absent in the city of Mexico, when the witnesses were produced and examined before the other commissioner. Held, in the absence of any proof of abuse or of any unfairness or partiality by the commissioner who acted, that this was no ground for vacating the commission. Ib.
- 3. A judge of the court out of which a commission to take testimony has issued, may, after the commission has been executed and returned, indorse upon it an allowance of the interrogatories and a direction as to the return, such as a judge of the court would have done, had he been applied to before the commission was dispatched. Ib.
- 4. After the evidence on a trial, before a referee has been chosen (and, it seems, even after the trial has begun), a stay should not be granted in order to allow a foreign deposition to be taken, except in a very clear case of necessity, and when substantial justice requires. 1872, Rathbun v. Ingersoll, 34 N. Y. Supreme Ct. (3 Jones & S.), 211.
- 5. Objection to depositions,—e. g., on the ground that some interrogatories were not fully answered,—should be taken on the trial, and are not available when taken for the first time on appeal, especially if unsubstantial. 1872, Vilmar v. Schall, 35 N. Y. Superior Ct. (3 Jones & S.), 67.
- 6. Where issue has been joined in an action as to one of several defendants, a commission may issue to take the testimony of a witness out of the State, although the other defendants have not answered. 1874, Treadwell v. Pomeroy, 2 Supreme Ct. (T. & C.), 470.

APPEAL, 18, 20, 21, 22.

DISMISSAL OF COMPLAINT.

DISCHARGE.

- A bankrupt must plead his discharge when he has the opportunity; and if he omits to, the court will not relieve him on motion. [2 Cai., 102; 9 Johns., 392; 11 Paige, 535; 1 Barb. Ch., 347; 18 Johns., 54; Id., 336.] 1873, Rudge v. Rundle, 1 Supreme Ct. (T. & C.), 649.
- Accordingly where an action was commenced in 1866, and two of the defendants obtained their discharge December 19, 1868, and judgment was entered June 11, 1869,—Heid, that no attempt having been made to plead the discharge, the judgment could not be vacated on motion. Ib.

DISCONTINUANCE.

- 1. An order entered upon stipulation of plaintiff's attorney and defendant, discontinuing the action without costs, after notice from defendant's attorney forbidding discontinuance without payment of his costs, may be vacated on motion. Supreme Ct., 1872, Wormer v. Canovan, 7 Lans., 36.
- 2. An action is not discontinued, except as between the parties, until the order of discontinuance is entered. Ib.
- 3. Notice of claim for costs, before entry, is sufficient, unless plaintiff has parted with value, as consideration for consent to discontinue. Ib.

DISCOVERY.

- In proceedings to obtain a discovery of books and papers (3 R. S., 5 ed., 293, § 60-66), the insertion, in the order for discovery, of a statement of the consequences of not obeying it, as is required by rule 20, although not authorized by the statute, can not vitiate the order. Supreme Ct., 1873, Rice v. Ehle, 65 Barb., 185; S. C., 46 How. Pr., 153.
- Rule that the affidavit must show that the evidence sought for can not be obtained from other sources [10 Abb. Pr., 340, 346], —reiterated. 1873, Holtz v. Schmidt, 34 N. Y. Superior Ct. (2 Jones & S.), 28.
 APPEAL, 19.

DISMISSAL OF COMPLAINT.

1. Although a bill may be allowed to stand over, on the objection of want of parties, and it is in the discretion of the court to dismiss it without prejudice to a new action, the court have not discretionary power to dismiss the action absolutely, for want of parties, as that might bar a new suit [4 Paige, 64; 7 Id., 451; Hoffm., 316]; and such a dismissal is ground of reversal on appeal. Ct. of App., 1873, Sherman v. Parish, 53 N. Y., 483.

DISTRICT COURT.

2. A dismissal of the complaint at the trial, after the evidence has been closed on both sides, on the ground that there was no evidence on a material point, is not within the rule in Bidwell v. Lamont, 17 How. Pr., 357; and Marine Bank v. Clements, 31 N. Y., 33; and is error if there be such evidence. 1871, Sulzbacher v. Davison, 34 N. Y. Superior Ct. (2 Jones & S.), 145.

DISTRICT COURT.

- 1. The provisions of the district court act [Laws of 1857, ch. 344], having been interpreted to authorize the issuing of an attachment upon the giving of an undertaking in a certain form, and such interpretation having for fourteen years been accepted and acted upon by the justices of the district courts and the counselors of the supreme court, practicing therein, Held, that such interpretation of the act, even though erroneous, would be upheld, where the adoption of a different rule would cause great mischief. N. Y. Com. Pl., 1871, Van Loon v. Lyon, 4 Daly, 149.
- 2. It seems, that to give a justice of one of the district courts of the city of New York jurisdiction to issue an attachment, the applicant must give a bond such as is required by the Revised Statutes (§ 29, art. 2, tit. 4, ch. 2, pt. 3) in cases where attachments are issued by justices of the peace in suits for \$100 or less. Those provisions of the Revised Statutes are re-enacted by the district court act [Laws of 1857, ch. 344, § 20]. Per J. F. Daly, J. Ib.
- 3. On appeal to this court from a judgment rendered in a district court, the notice of appeal, required by section 353 of Code of Procedure, should point out clearly the error complained of, whether in the process, pleadings, proceedings on the trial, or in the rendering of judgment. It is not enough to state generally that the judgment appealed from is against both the law and the evidence, and should have been in favor of the appellants and against the respondents. N. Y. Com. Pl., 1871, Begley v. Chose, 4 Daly, 157.
- Where the notice of appeal states no more than this, the judgment will be affirmed, without an examination of the merits. Ib.
- 5. By the district court act, as amended by Laws of 1862, ch. 484, § 3, which provides that the rules and regulations of the supreme court shall apply to the district courts as far as they can be made applicable, a subsequent action can not be brought in a district court, while the costs, due in a prior action for the same subjectmatter, which action has been discontinued with costs, remain unpaid. N. Y. Com. Pl., 1872, Flewelling v. Brandon, 4 Daly, 333.

DOWER. .

DIVORCE.

- 1. In an action for divorce, brought by a husband against his second wife, on the ground that he had a first wife living at the time of the second marriage, he obtained a divorce by her failure to defend; and he afterwards married a third wife. The second wife was subsequently allowed to open the judgment of divorce on the ground of fraud, and to put in an answer alleging the validity of the second marriage. The third wife then obtained leave of court to intervene, and she put in an answer alleging the invalidity of the second marriage, and insisting on the validity of her own, the third. Held, that without any amendment of the complaint, the court could not adjudge both the second and third marriages void. Anonymous, Ante, 171.
- 2. It is only where such relief is applied for in the manner prescribed in the statute, by one of the parties to the marriage claimed to be unlawful on account of the existence of a former husband or wife of one of them, that the statute allows such marriage to be adjudged void. 1b.
- 3. Plaintiff and T., her husband, were residents of Massachusetts. She went to Vermont, and obtained a divorce for abandonment. Service of some papers was admitted by T. in Massachusetts, who waived all irregularities in the service. Subsequently plaintiff married defendant in this State, and now brought this action for divorce on the ground of adultery. Defendant answered that the divorce granted in Vermont is a nullity. Held, that the cause of action in the former suit not having accrued while the parties were domiciled there, the courts of that State acquired no jurisdiction [4 Lans., 388; 57 Barb., 305]; that the service outside the State was a nullity [42 Barb., 317], and that the answer set forth a good defense. [41 N. Y., 272; 31 Barb., 69; 12 Id., 640; 15 Johns., 141; 4 Paige, 425; 2 Bish. on M. and D., § 156 (731), 4 ed.] 1874, Moe v. Moe, 2 Supreme Ct. (T. & C.), 647.
- The wife's having venereal disease, though herself unsuspected of infidelity, not, alone, evidence of husband's infidelity. Homburger v. Homburger, 46 How. Pr., 346.
- Burden of proof, and effect of delay, in case of divorce sought for impotence. Cuno v. Cuno, 6 Eng. R. (Moak's Ed.), 73.

ANSWER, 8-5; COMPLAINT, 7.

DOWER.

1. The devisee of land, subject to a power given to the executors to sell and convey, has a vested estate, of which, on his death after the testator's death, and before the exercise of the power of sale,

EQUITY.

his widow is entitled to dower; and on a subsequent exercise of the power of sale, the widow is entitled to share in the distribution of the proceeds, when brought into the surrogate's court under Laws of 1837, ch. 460, § 75 (3 R. S., 5 ed., 198, § 72). Timpson's Estate, Ante, 230.

- 2. The widow is entitled to crops planted before her husband's death, and growing on the lands assigned to her for dower. [2 Coke's Inst., 80; 1 Greenl. Cruse, 194, § 29; 4 Kent Com., 66; 17 Pick., 236; 6 N. Y., 597; Will. on Ex., 633-635.] And her omission to object to including them as assets in the inventory, and to the sale of them as such, does not waive her claim. 1873, Clark v. Battorf, 1 Supreme Ct., 58.
- 3. The amount payable to a dowress in lieu of dower is fixed by statute [3 R. S. (5 ed.), 613, § 61], and this amount can not be changed by rule of court. So far as rule 85 of this court conflicts with the statute it must yield. 1874, Banks v. Banks, 2 Supreme Ct. (T & C.), 483.
- 4. As between a wife and any other than the State, or its delegates or agents, exercising the right of eminent domain, an inchoate right of dower in lands is a subsisting and valuable interest; and the wife may maintain an action for damages for fraud by which she was induced to release the same. Ct. of App., 1873, Simar v. Canaday, 53 N. Y., 298.

DRAINAGE.

Proceedings under the Orange county act. Houston v. Wheeler, 52 N. Y., 641.

ELECTION OF REMEDIES.

In case of a warranty of quality. Day v. Pool, 52 N. Y., 416; affirming 63 Barb., 506.

EQUITY.

- A court of equity has jurisdiction to compel the delivery of deeds or other instruments to the persons entitled to their possession. [Story Eq. Juris., § 703; Willard's Eq. Juris., 307.] 1873, Stanton v. Miller, 1 Supreme Ct. (T. & C.), 23.
- Relief in equity will never be denied, merely because the elements
 of some well defined trust or fiduciary obligation, are wanting.
 [4 Myl. & Cr., 269.] 1873, Platt v. Platt, 2 Supreme Ct. (T. & C.),
 25.
- 3. The rule that a court of equity will not, where the fraudulent

ESTOPPEL.

purpose is disclosed, give relief to either of the parties to the deed who are implicated in the fraud [Story's Eq. Jur., §§ 298, 299; 52 Barb., 271],—illustrated. 1873, Mapes v. Snyder, 2 Supreme Ct. (T. & C.), 318.

The doctrine of relief, in equity, against forfeitures, in its application to life insurance. 1873, Hayner v. American Popular Life Ins. Co., 35 N. Y. Superior Ct. (3 Jones & S.), 266. See note at p. 282.

ERROR.

- 1. To make a legal error, in a finding of fact which this court may review, there must be no evidence in the case upon which the findings may be based. To make such error in a refusal to find, the evidence must be clearly conclusive in favor of the finding proposed. Ct. of App., 1873, Bryce v. Lorillard Fire Ins. Co., 46 How. Pr., 498; affirming 35 N. Y. Superior Ct. (3 Jones & S.), 394.
- 2. The rule that error at the trial may be overlooked by the appellate court when the party complaining was not prejudiced thereby, is in criminal cases, only applicable where the error could by no possibility have produced injury. Ct. of App., 1873, Stokes v. People, 53 N. Y., 164.
- 3. A prisoner convicted of felony brought a writ of error, but failed to have a record made up which would show the proceedings on the trial. It was claimed that certain matters essential to the validity of the proceedings on the trial were omitted, but these omissions did not appear by the return. Held, that the prisoner could not take advantage of his own laches in neglecting to have a proper return made, and this court could not interfere. 1873, Dent v. People, 1 Supreme Ct. (T. & C.), 655; S. C., 46 How. Pr., 264.
- The exclusion of a competent juror, not error for which a new trial should be granted. 1873, Armsby v. People, 2 Supreme Ct. (T. & C.), 157.
- Judgment in criminal cases not reversed for technical error. Higgins v. People, 7 Lans., 110.

ESTOPPEL.

A person who has signed a petition for the repaying of a street is not estopped from contesting the legality of an assessment therefor, upon the ground that a majority of the property owners did not consent. 1873, Matter of Sharp, 1 Supreme Ct. (T. & C.), 427.

EVIDENCE. 1: EXECUTORS AND ADMINISTRATORS, 6, ; JUDGMENT, 7, 8; PLEADING, 16.

EVIDENCE:

EVIDENCE.

- 1. When a former adjudication is set up in bar to a second action, it is competent to prove by parole that the demand in the second suit had not accrued at the time of the first, and that it was excluded from recovery in the first on that ground; and this may be proved by the testimony of a juror. In such case, the defendant having defeated a recovery for the demand in the first action, on the ground that it was not due, will be estopped from relying on the adjudication as a bar to the second. Supreme Ct., 1873, Marcellus v. Countryman, 65 Barb., 201.
- Competency of acts and declarations of confederates in criminal cases. Ormsby v. People, 53 N. Y., 472.
- The burden of proof is upon one disputing the authority of an administrator, on the ground of want of jurisdiction of the surrogate, to show such want of jurisdiction. Ct. of App., 1873, Welch v. N. Y. Central R. R. Co., 53 N. Y., 610.
- 4. An attachment issued by a county judge for disobedience to his order, is presumed to have been issued on proper proof; and in an action for false imprisonment, where the judge testified that he could not remember how the proof was made, but thought it had been,—Held, that the burden of proving the negative was on the plaintiff. Miller v. Adams, 7 Lans., 131. (Affirmed in 52 N. Y., 409.)
- Evidence that the payee of a note was the attorney or agent of another person beneficially interested, not excluded as tending to contradict the writing. Supreme Ct., 1873, Stebbins v. Brown (No. 2), 65 Barb., 274.
- 6. A bill of items, proved to have been copied from original entries, is admissible, at least, to show what charges were actually made. And books of original entry, and books of entries transcribed from lost books, are admissible in evidence, as memoranda of witnesses who testify to delivery of the items of the account. Supreme Ct., 1873. Green v. Disbrow, 7 Lans., 381.
- 7. In an action against the guarantor of a mortgage, the breach alleged being non-payment, and the answer, besides impeaching the guaranty, setting up that plaintiff had received satisfaction, the burden of proof is on plaintiff to prove non-payment; because, 1, he alleged non-payment; 2, this non-payment was by a third person, and equally within plaintiff's knowledge; 3, the amount received was, under the circumstances, peculiarly within plaintiff's knowledge; 4, the case was one which entitled defendant, as a surety, to an account. 1872, Schlesinger v. Hexter, 34 N. Y. Superior Ct. (3 Jones & S.), 499

- 8. Plaintiff sued to recover for services rendered at an agreed rate of compensation. Defendant settled the suit by paying a sum not stated. In a subsequent action to recover for services alleged to have been performed under the same contract,—Held, that it not appearing for what sum the settlement in the former action was made, the proceedings in that action were not evidence in the second action on the question of the rate of compensation agreed on between the parties. N. Y. Com. Pl., 1871, Briggs v. Smith, 4 Daly, 110.
- Rules as to the weight of evidence in the case of mutual mistake, alleged as ground for reforming a contract. 1873, Bryce v. Lorillard Fire Ins. Co., 35 N. Y. Superior Ct. (3 Jones & S.), 394; affirmed in 46 How. Pr., 498.
- Rules as to exclusion of parol evidence to alter written contracts,
 —applied in an action on a note. Sickles v. Gillies, 35 N. Y.

 Superior Ct. (3 Jones & S.), 14.
- Limited to the parties to the contract. Ct. of App., 1873,
 Coleman v. First Nat. Bank of Elmira, 53 N. Y., 388.
- Exceptions to the general rule. 1873, Hope v. Smith, 35
 Y. Superior Ct. (3 Jones & S.), 458.
- 13. On the question of the mutual rights of third persons, not parties on the record, such evidence is admissible as would have been receivable between those persons. Ct. of App., 1873, Ledwich v. McKim, 53 N. Y., 307, affirming 34 N. Y. Superior Ct. (3 Jones & S.), 304.
- In an action on a verbal agreement, a covenant or bond to similar effect, was held admissible. Tuttle v. Hannegan, 4 Daly, 92, affirmed in 54 N. Y., 686.
- 15. Damages resulting from breach of contract must be proven with reasonable certainty. They can not be based upon speculation and conjecture. Supreme Ct., 1873, Holloway v. Stevens, 46 How. Pr., 363.
- 16. The cost of a structure such as an ice-bouse can not be proved by evidence of the cost of another similar structure, for this would involve a collateral issue of comparison. Gouge v. Roberts, 53 N. Y., 619.
- 17. It seems that it is discretionary with the judge on the trial whether or not to admit evidence of the silence of the prisoner when under arrest for the crime for which he is being tried. [Reviewing authorities.] 1873, Ormsby v. People, 2 Supreme Ct. (T. & C.), 157.
- 18. Where evidence of this character was admitted, and afterwards confirmed by other testimony,—Held, no error. Ib.
- 19. J. T. and E. were copartners, W. conspired with E. to obtain from the latter the firm note for an indebtedness from E. to W. E.

made the note, then absconded for a time, and W. brought suit on the note, and levied an attachment on the goods of the firm J. & T. Plaintiffs here commenced this action for dissolution, for a receiver, for an accounting, for an injunction restraining W. from interfering with the copartnership assets, and that it be determined whether the note given by E. was an individual or a copartnership debt. Pending this action, the suit by W. was tried and plaintiffs here were successful. Held, that the judgment roll in the suit brought by W. was admissible in this action, the existence of the action having been pleaded, and that plaintiffs were entitled to the relief sought, and that W. was a proper party. 1873, Jennings v. Whittemore, 2 Supreme Ct. (T. & C.), 377.

- 20. In proceedings by a gaslight company to acquire lands for laying its pipes, &c., under a special provision in its charter, a witness was asked the additional expense of digging and maintaining a drain, made necessary by the use of the land by the company. Held, competent. 1873, Bloomfield, &c. Gaslight Co. v. Calkins, 1 Supreme Ct. (T. & C.), 549.
- 21. A witness not in the employ of a bank at the time entries were made in its books, can not give his opinion as to what the entries showed. 1873, Smith v. Smith, 1 Supreme Ct. (T. & C.), 63.
- 22. Nor can a witness not shown to have made the entry state what, in his opinion, the entry referred to. Ib.
- 23. To prove a failure of title to chattels sold, the purchaser put in evidence a record of forfeiture under the internal revenue act, which record did not indicate the time or times at which the offenses for which the forfeiture was adjudged were committed. Held, that this could be supplied by extrinsic evidence. [4 N. Y., 71; 11 Id., 420; 26 Id., 117.] Ct. of App., 1873, McKnight v. Devlin, 52 N. Y., 399.
- To establish fraud. Jaeger v. Kelly, 52 N. Y., 274; affirming 44
 How. Pr., 122.
- 25. The interest of a party charged with fraud may be given in evidence. [35 Barb., 630; 33 Id., 127; 14 N. Y., 567.] Stearns v. Ingraham, 1 Supreme Ct. (T. & C.), 218.
- 26. Evidence which as corroborative might be proper, may still be incompetent because also tending to prove frauds by defendant other than those in issue. Ib.
- 27. Rules as to proof of handwriting. Morey v. Safe Deposit Co., 34 N. Y. Superior Ct. (2 Jones & S.), 154.
- 28. Minutes of grand jury showing indictment ordered against the accused, on the complaint of the deceased, *Held*, inadmissible on trial for homicide, without proof that the accused had knowledge of such action. *Ct. of App.*, 1873, Stokes v. People, 53 N. Y., 164.

- 29. In an action to recover damages for injuries to lands, the question "what was the annual damage?" is inadmissible [29 N. Y., 9; 44 Barb., 120.] The witness may give the annual value before and after the injury, but it is for the jury to find the amount of resulting damage. 1873, Hudson v. Caryl, 2 Supreme Ct. (T. & C.), 245.
- 30. Insolvency of corporation presumed from appointment of receiver. Sands v. Graves, 1 Supreme Ct. (T. & C.), adden. 13.
- 31. On a question of legitimacy, the declarations of the alleged wife of the ancestor, both being dead, are competent to prove that the ancestor and she were husband and wife. [25 Wend., 205; 38 N. Y., 296, 298.] 1873, Alexander v. Chamberlain, 1 Supreme Ct. (T. & C.), 600.
- Requisite proof of marriage promises. Homan v. Earle, 53 N. Y., 267; affirming 13 Abb. Pr., N. S., 402.
- 83. In an action for criminal conversation, a certificate of a justice of the peace as to the fact of the marriage, which does not conform to the statute, is insufficient to prove such marriage. 1873, Dann v. Kingdom, 1 Supreme Ct. (T. & C.), 492.
- 34. The rule that in actions for criminal conversation, divorce, and in prosecutions for bigamy, an actual marriage must be proven, that a marriage proved by reputation is not sufficient [2 Phil. Ev., 201; Cowen & Hill's notes (782), 410; 4 Burr., 2057; 1 Doug, 170; 2 Greenl. Ev., § 49; 4 Johns., 53; 7 Id., 314,]—reiterated. Ib.
- 35. Minutes of former trial, taken by deceased counsel, excluded. Cranch c. Parker, 1 Supreme Ct. (T. & C.), adden., 1.
- Requisites of certificate of organization of national bank. 1872,
 Merchant's Exch. Nat. Bank v. Cardozo, 35 N.Y. Superior Ct. (3 Jones & S.), 162.
- 37. By reason of the difficulties in tracing goods lost on connecting lines of railroad, books kept by a railroad company, when proven to be such, are competent evidence prima facie of the entries therein of the receipt of such goods; nor is it necessary to prove that an entry is in the handwriting of any servant of the company, if it appears that the entries have been made in the same handwriting for such a length of time as to satisfy a jury that the person making the entries was the recognized agent of the company. 1873, Root v. Great Western Railway Co., 1 Supreme Ct. (T. & C.), 10.
- 38. In an action to recover damages for injuries caused by negligence of defendant, the true rule as to the burden of proof of the concurring negligence on the part of the plaintiff is, that plaintiff must satisfy the jury, in order to entitle him to recover, that he was not guilty of negligence which contributed to produce the injury for which the action is brought; but is not called on to make such proof in the

first instance, unless the circumstances disclosed by his own witnesses tend to show him guilty of negligence. When his negligence is not thus established it is to be affirmatively proved by the defendant. In any view of it, it is purely matter of defense. [Reviewing authorities and following 20 N. Y., 65; 43 How. Pr., 222.] Supreme Ct., 1873, Robinson v. N. Y. Central, &c. R. R. Co., 65 Barb., 146.

- 39. When a loss has been occasioned by apparent negligence of a ferryman in not providing sufficient guards, the burden is on him to show that the accident was not occasioned by his fault. Ct. of App., 1873, Wyckoff v. Queens Co. Ferry Co., 52 N. Y., 32.
- 40. In an action to recover for loss of plaintiff's property by negligence of a ferryman, it is not competent to ask a witness whether after the accident she had expressed the opinion that plaintiff might have prevented the accident; at least, unless the foundation be laid for it as evidence impeaching her testimony. *Ib*.
- 41. The opinion of a witness (not shown to be qualified) as to the amount of injury sustained by premises in consequence of neglect, is inadmissible. [29 N. Y., 9.] 1873, Robinson v. Kinne, 1 Supreme Ct. (T. & C.), 60.
- 42. A witness was asked "where was the steer when the train struck him, as indicated by the marks on the ground and track?" Held, competent as matter of fact, not of opinion. 1874, Fanning v. L. I. R. R. Co., 2 Supreme Ct. (T. & C.), 585.
- 43. Distinctions between presumptions of law and presumptions of fact. Justice v. Lang, 52 N. Y., 323.
- 44. It seems, that the court, will take judicial notice of the population of counties and of their public officers. Supreme Ct., 1872, Farley v. McConnell, 7 Lans., 428; affirmed in 52 N. Y., 630.
- 45. In an action for the seizure, on execution, of property, which the plaintiff claims was exempt, it is sufficient for him to prove that the articles levied on and claimed were those specified by the statute, were necessary, and were within the value limited, &c., without going into proof of what other property he may have owned. [57 Barb., 641.] 1873, Reinecke v. Flecke, 35 N. Y. Superior Ct. (3 Jones & S.), 491.
- 46. In an action for recovery of real property, where there was proof that an original redemption affidavit was presented to the sheriff; that search had been made in the county clerk's office for the redemption papers, but they were not found; and that it was probable they had been destroyed by fire if ever there;—*Held*, that no distinct objection having been taken to the sufficiency of the search, a copy of the redemption affidavit was properly received in evidence. Supreme Ct., 1872, Rice v. Davis, 7 Lans., 393.

EXCEPTIONS.

- 47. The regularity of proceedings to redeem, presumed from recitals in sheriff's deed. Ib.
- 48. The original sheriff's certificate of redemption is by statute prima facie evidence of facts therein stated. [3 R. S., 5 ed., §§ 84, 85.] Ib.
- 49. The receipt or certificate of the sheriff who made a sale on execution is sufficient evidence of payment of the redemption money, and establishes the complete redemption of the property from the sale under the execution. Elsworth v. Muldoon, Ante, 440.
- 50. Such certificate need not be acknowledged or filed. Ib.
- 51. A memorandum made upon such receipt, by an attorney since deceased, that he made the payment and took the receipt for the debtor, naming him, is also admissible to prove the redemption. Ih.
- Recitals as evidence. Christie v. Gage, 2 Supreme Ct. (T. & C.), 344.
- Statutory presumptions as to tax sales; and invalidity of assessments without verification. Johnson v. Elwood, 53 N. Y., 431.
- 54. Of value of merchandise, by auction sale. Heinmuller v. Abbott, 34 N. Y. Superior Ct. (2 Jones & S.), 228.
- Appropriate evidence of the value of attorney's services. Garfield
 Kirk, 65 Barb., 464; Harland v. Lilienthal, 53 N. Y., 438.
- Sale of merchandise in 1866 not evidence of value in 1864.
 Whelan v. Lynch, 65 Barb., 326.
- Rules as to proving value of horse. Sunderlin v. Wyman, 1 Supreme Ct. (T. & C.), adden., 17.
- Admissibility of price current. Whelan v. Lynch, 65 Barb., 326.
 Extrinsic evidence of testator's intent. Phillips v. McCombs, 53
- Extrinsic evidence of testator's intent. Phillips v. McCombs, 53
 N. T., 494.
- CAUSE OF ACTION, 3; DIVORCE, 4; JOINT STOCK COMPANY; JUDGMENT, 5, 16; MALICIOUS PROSECUTION, 2; NEW TRIAL; PLEADING, 31; TRIALS, 28.

EXAMINATION OF PARTY.

If a party attending to testify, on his examination as a witness before trial at the instance of the adverse party, refuses to answer a material and proper question, his pleading may be stricken out. Richards v. Judd, Ante, 184.

EXCEPTION.

 Where evidence has been admitted by a referee under objection, the presumption is, that, as he held the evidence not only competent, but material, it may have influenced his findings. And it must very clearly appear that it could have had no such influence,

EXCEPTIONS.

before the court, in an action at law, can disregard the objection to it. 1873, Smith v. Smith, 1 Supreme Ct. (T. & C.), 63.

2. Rules applicable to exception, or the omission to except, on the trial by jury of specific questions of fact, under section 72 of the Code. Vermilyea v. Palmer, 52 N. Y., 471.

3. The right of the party holding the affirmative of the issue, to open and close at the trial, is a legal right, and if refused by the

judge, an exception lies. Millerd v. Thorn, Ante, 371.

4. The rule that an exception is unavailing unless some ground is stated therefor [20 N. Y., 32; 50 Id., 392; 3 Keyes, 316], does not apply where the evidence is upon its face inadmissible. In such case, upon objection being made, the party offering it is bound to show its admissibility. [38 N. Y., 328.] 1873, Childs v. Delaney, 1 Supreme Ot. (T. & C.), 506.

- 5. The rule that it is not necessary that plaintiff should request that the case be submitted to the jury, in order to give him benefit of an exception to a direction of the court that a verdict be given for defendant,—applied. [47 N. Y., 566.] Ct. of App., 1873, Frecking v. Rolland, 53 N. Y., 422; reversing 33 N. Y. Superior Ct. (1 Jones & S.), 499.
- 6. The court charged the jury, in substance, that if they believed plaintiff's statement, he was entitled to recover a specific sum. Held, that this involved two propositions, viz., the right to recover and the measure of damages,—within the rule that an exception must be specific to each proposition. Ct. of App. 1873, Hayden v. Demets, 53 N. Y., 426; affirming 34 N. Y. Superior Ct. (2 Jones & S.), 344.
- 7. After a trial before a referee, a party can not, on the settlement of the case for the purpose of an appeal, request findings of fact, and except to the referee's refusal to make them. There is no authority for taking exceptions, except on the decision of questions of law occurring during the trial, and except also to findings of law contained in the report, such exceptions being taken within ten days after notice of the judgment, and except also that class of exceptions formerly allowed in equity to reports on taking accounts, &c. Requests for findings upon which to base exceptions, should be made before the submission of the cause to the referee, like requests to charge. After report, the remedy for the referee's omission to make desired findings is to apply to the court to send the case back to the referee. [Citing authorities.] The provision of rule 41, that the judge or referee shall, at the time of settling the case or exceptions, find on such other questions of fact as may be required by either party and may be material to the issue,relates to questions of fact only, and like the proviso in section 268 is simply directory, and does not authorize the judge or referee to N. s.—XV.—33

- insert in the case new exceptions, or exceptions not in fact taken when the request could be granted. Supreme Ct., 1973. Carroll v. Staten Island R. R. Co., 65 Barb., 32.
- 8. The only findings that a judge or referee can make at the time of settling the case or exceptions are in addition to those previously found, and not in contradiction thereof. If the findings incorporated in the record of judgment are erroneous, application must be made to the court to send them back for correction. Findings contradictory thereto made on the settlement of the case can not be regard d on appeal. Supreme Ct., 1873, Pendleton v. Hughes, 65 Barb., 136.
- Exceptions to findings of fact are not authorized. Garfield v. Kirk, 65 Barb., 464: nor to refusal to find additional facts. Rogers v. Wheeler, 52 N. Y., 262; affirming 6 Lans., 420.
- 10. A stipulation between counsel that a bill of exceptions may, on an appeal from a judgment, be heard in the first instance at general term, is irregular, 1873, Pendleton v. Pendleton, 1 Supreme Ot. (T. & C.), 95.
- 11. When the exceptions are ordered to be heard in the first instance at general term, the party moving for a new trial is confined to the exceptions taken at the trial, and he also loses the right of review upon the evidence in the case. 1873, Siegel v. Schantz, 2 Supreme Ot. (T. & C.), 353.

EXECUTION.

- Execution must in all respects follow the judgment, be warranted by it, and strictly pursue it. Farmers' & Mechanics' National Bank v. Crane, Ante, 434.
- If the judgment be against two, execution against the person of one alone can not be issued, even after the other has been discharged.
 An exoneration of one must be by indorsing a direction to the sheriff. Ib.
- 3. An execution against the person of a defendant should be set aside, unless an execution against his property was previously issued to the sheriff of the same county, and returned unsatisfied. Noe v. Christie, Ante, 346.
- 4. After defendant is in custody of the sheriff, on execution, plaintiff can not issue another execution against the person of defendant on the same judgment, even to another county. 1b.
- Married woman not liable to execution against the person on judgment for costs against her in her unsuccessful suit for slander. Maloy v. Dagnal, 1 Supreme Ct. (T. & C.), adden., 10.
- 6. A sheriff levied process on a safe which did not belong to the

- . judgment debtor, and in which was locked up merchandise belonging to still another person, the present plaintiff. The sheriff removed the safe and contents to an auction room, unpacked the merchandise and deposited it, marked with his name upon it, with the auctioneer, and sold the safe on the execution. Held, that the seizure of the safe being wrongful, that of the contents was so, also; but the obligors in the indemnity bond given to the sheriff were not liable in respect of the contents, without proof that they had knowledge thereof. Chapman v. Douglas, Ante, 421.
- 7. One who points out property to an officer with process, as belonging to a third person, in consequence of which the officer levies and sells it, is estopped, as against the officer, from subsequently claiming that it was his own. 1872, Chapman v. O'Brien, 34 N. Y. Superior Ct. (2 Jones & S.), 525.
- 8. Although the provision of the Code (section 282) terminates wholly the lien of a judgment on real property, at the expiration of ten years, instead of allowing it to continue, as under 2 R. S., Edm. Ed., 371, §§ 3, 4, as against the debtor,—yet, under the Code, as before, an execution may be issued, and a levy and sale be made after the lapse of ten years, if the debtor still remains owner. 1872, Beard v. Sinnott, 35 N. Y. Superior Ct. (3 Jones & S.), 51.
- It seems, that a surrogate's order allowing execution to issue, though
 made after the lapse of ten years from the recovery of the judgment, revives the judgment as against the heirs. Ib.
- 10. A new award of execution is not necessary on the recapture of a prisoner after his escape from prison before the expiration of his term. The original judgment and execution will authorize his imprisonment for the completion of the term. Ct. of App., 1873 Haggerty v. People, 53 N. Y., 476; reversing as to the proceedings below, 6 Lans., 332.
- 11. Where only the summons is served, and there is no appearance, if the complaint alleges fraud on the part of defendant, but plaintiff does not procure an order of arrest before judgment, he waives the remedy against the person. [45 N. Y., 349.] And according to the law of this State, any remedy by reason of the fraud is regarded as merged in the judgment. Whether under the bankrupt law, act of Congress, 1867, section 33, the remedy against the person can be deemed preserved,—query. Ct. of App., 1873, Shuman v. Strauss, 52 N. Y., 404; affirming in effect 34 N. Y. Superior Ct. (2 Jones & S.), 6.
- 12. The court having jurisdiction of an action in which it had given judgment, and execution against the person had been awarded and executed, may set aside the execution on application in a proper case, especially if this be done before the return day; though it

may be otherwise of discharging the defendant without setting aside the writ. Ct. of App., 1873, Pinckney v. Hegeman, 58 N. Y., 31; affirming 4 Lans., 374.

- Sale under execution, after release or payment of judgment,—
 Held, void. Stillwell v. Carpenter, 1 Supreme Ct. (T. & C.), 615.
- 14. The payment, by a collecting agent, of moneys of his principal to the sheriff, on an execution issued in a suit in which such moneys had been attached in his hands as the property of his principal, is no protection to the agent against an action by one who, prior to the commencement of the attachment suit, took an assignment from the principal, of the fund, and gave notice to the agent after the attachment and before the execution. 1872, Greentree v. Rosenstock, 34 N. Y. Superior Ct. (2 Jones & S.), 505.
- 15. The appropriation of partnership property by judgment, execution, and sale, against all the partners, in payment of a partnership debt, confers a perfect title upon the purchaser of real estate belonging to the firm, as against the general lien of a judgment of prior date docketed against an individual partner for his separate debt, and no presumption arises, without proof, that at the time of docketing the judgment against an individual partner, there was a residuum belonging to him to qualify the title obtained by the partnership judgment {1 Wend., 311; 2 Id., 553; 3 Denio, 128; Am. Lead. Cas. in Equity, 206; 1 Harris, 544; 7 Fost., 37; 7 Cush., 386; 20 Vt., 479; 1 Am. Lead. Cas., 472, 479 (4 ed., Phil., 1857).] 1873, Martin v. Wagener, 1 Supreme Ct. (T. & C.), 509.
- 16. Where one has in his possession, or offers for sale, the green skin or fresh carcass of a deer, killed in violation of Laws of 1867, ch. 898, he is liable for the penalty, though his title and possession were acquired at sheriffs sale on execution against the property of the killer. Supreme Ct., 1872, Bellows v. Elmendorf, 7 Lans., 462.
- 17. Reversal of the judgment on which execution issued against attached property, does not invalidate the levy or sale, or make either the party or the officer a trespasser. It merely annuls the title acquired by the sale, and entitles the owner of the chattel to recover it from any one into whose possession it has come. Supreme Ct., 1872, Reinmiller v. Skidmore, 7 Lans., 161.
- 18. One having a chattel for a certain time for a particular use and no other, and prohibited from selling or loaning it, has merely a personal license to use the chattel, and his interest can not be the subject of sale under an execution. Ib.
- 19. An execution creditor who, with notice of facts sufficient to put him on inquiry, purchases at his own execution sale, and without making any advances thereat, goods which the debtor in the execution had obtained by fraud from a third person,—does not thereby

- become a bona fide purchaser. Ct. of App., 1873, Devoe v. Brandt, 53 N. Y., 462; reversing 58 Barb., 493.
- 20. Sale of land on execution issued on a personal judgment for deficiency in foreclosure, against a defendant who was a non-resident, and had neither appeared nor been served within the State,—Held, wholly void, and the purchaser acquired no title. Ct. of App., 1873, Schwinger v. Hickok, 53 N. Y., 280.
- 21. The fact that a debtor has, by compulsion of the court, in a suit in the nature of a creditor's bill, assigned to a receiver all his real estate, does not deprive him of the power to redeem such real estate from a sale on execution against him. Elsworth v. Muldoon, Ante, 440.
- 22. The right of the debtor to redeem is independent of whether he retains any interest in the land. Ib.
- 23. It seems, that the right of the debtor to redeem is independent of whether he retains any interest in the land. Livingstone v. Arnoux, Ante, 158.
- 24. A redemption not made on or after but before the last day of the fifteen months allowed by statute [3 R. S., 5 Ed., 656, § 82], is valid, though not made in the county in which the sale took place. Supreme Ct., 1872, Rice v. Davis, 7 Lans., 393.
- 25. The homestead exemption act does not affect the rights of creditors to redeem from execution sales made under judgments docketed prior to the record of the notice of exemption. Ib.
- 26. It is sufficient to make a redemption so far as the debtor is concerned, that one of several judgments under which the creditor purports to redeem was properly certified. As one judgment properly certified would entitle him to redeem, the remainder may be disregarded as unnecessary. And the same is true of so much of the redemption affidavit as showed other judgments and stated the sum total of all. 1b.
- 27. To redeem from a redeeming creditor judgments not properly authenticated are not entitled to be paid. Ib.
- 23. An affidavit stated that the affiant "is the person to whom the above several described judgments are assigned, and that the same are true copies of the original assignments of such judgments," that he "carefully compared them with such original assignments, and that they are true copies of such original assignments: "—Held, that the word "same" might fairly be inferred to refer to the assignments of the judgments; and, the affidavit being proved by copy, the original having been lost, that it was a substantial compliance with the statute. Ib.
- 29. Slight variations in the verification of the assignments of judgments are not regarded as fatal. Ib.

EXECUTORS AND ADMINISTRATORS.

- 30. The receipt or certificate of the sheriff who made the sale is sufficient evidence of the payment of the redemption money, and establishes the complete redemption of the property from the sale under the execution. Livingstone v. Arnoux, Ante, 158.
- 31. The provisions of 2 Laws of 1847, p. 508, ch. 410, apply only to redemptions made by creditors of the debtor, and not by the debtor himself. Ib.

APPEAL, 44, 52; QUESTIONS OF LAW AND FACT, 11, 12.

EXECUTORS AND ADMINISTRATORS.

- 1. The jurisdiction of the surrogate to grant letters of administration does not depend on proof of the death of the intestate, and on the examination on oath of the applicant; and it not appearing that these facts were not proved, the presumption is, when the letters are drawn collaterally in question, that the statutory direction was complied with. Farley v. McConnel, 52 N. Y., 630; affirming 7 Lans., 428.
- The appointment of a judgment debtor as executor discharges neither the debt nor the judgment, under the provisions of the statutes. [3 R. S., 5 ed., 170, § 14.] 1873, Soverhill v. Suydam, 2 Suprems Ct. (T. & C.), 460.
- 3. In order to set in motion the short limitation, in favor of an executor or administrator, due notice of the rejection of the claim presented to him by the creditor must be given to the creditor himself. A notice to an attorney, who had been employed by the creditor to make out in legal shape and present the claim, is not notice to the creditor. N. Y. Com. Pl., 1871, Van Saun v. Farley, 4 Daly, 165.
- 4. A debtor of an intestate, when sued for the debt by one of the administrators, can not plead the consent of the other administrator to his withholding payment, in bar of the action. 1873, Strever v. Feltman, 1 Supreme Ct. (T. & C.), 277.
- 5. Executor can not sue for constructive clauses of will relating to real estate with which he has nothing to do. 1873, Brundage v. Brundage, 1 Supreme Ct. (T. & C.), 83, S. C., 65 Barb., 397.
- 6. In an action on an administration bond, the obligors are estopped from denying the jurisdiction of the surrogate over the estate; and they can not question the decree of the surrogate, for the disobedience of which, the action on the bond is brought. Field v. Van Colt, Ante, 349.
- 7. An administration bond is not void, nor insufficient to enable the administrator to maintain an action, because conditioned to obey the orders of the county judge instead of those of the surrogate,

FORECLOSURE.

unless it be shown that there was a surrogate in the county in question. Farley v. McConnel, 52 N. Y., 630; affirming 7 Lans., 428.

8. When executors and trustees under a will are vested with an apparently valid title, an injunction and receiver will not be ordered on a motion before trial, especially when the right of plaintiff is not clear. Supreme Ct., Sp. T., 1873, Patterson v. McCunn, 46 How. Pr., 182.

EXTRADITION.

In what cases allowed; and mode of proceeding, particularly in case of criminals from United States, in Canada. 6 Eng. R. (Moak's ed.), 138, n.

FALSE IMPRISONMENT.

- 1. An action for false imprisonment, as distinguished from an action for malicious prosecution, can not be maintained, if the power to make the arrest existed. Where a power to arrest is exercised without probable cause, and with malice, the remedy is an action for malicious prosecution. Stage Horse Cases, Ante, 51.
- 2. To constitute such an arrest as will sustain an action of false imprisonment if it be unlawful, an actual manual touch of the body is not necessary [Bull, N. P., 62; Ryan & Moody, 321; 2 Bos. & Pul. N. R., 211; 1 Wend., 210; 100 Mass., 79; 9 N. H., 491; 18 Id., 202], but only a restraint of liberty of the person by an officer having a warrant. 1873, Searls v. Viets, 2 Supreme Ct. (T. & C.), 223.
- 3. Although a person making a criminal accusation may act upon appearances, yet a groundless suspicion, unwarranted by the conduct of the accused, or by facts known to the accuser when the accusation is made, will not exempt the latter from liability to the accused, if innocent, for damages for causing the arrest. Ct. of App., 1873, Carl v. Ayres, 53 N. Y., 14.

FORECLOSURE.

1. In a foreclosure for default in interest, the complaint alleged plaintiff's election to receive the whole sum under the thirty days' clause; and defendant's answer alleged a tender to plaintiff's agent, and denied that the principal had become due. Held, that this issue should have been tried, and that it was error, in the absence of anything in the affidavits tending to show fraud or improper conduct by the plaintiff (as in the case of Noyes v. Clark,

FORCIBLE ENTRY.

- 7 Paige, 179,] to order a stay upon motion. Ct. of App, 1873, Bennett v. Stevenson, 53 N. Y., 508.
- 2. A personal judgment for deficiency can not be rendered against a non-resident defendant, who has neither appeared in the action nor been served with process within the State. The court may, without personal service, appropriate property within the State to the payment of debts; but can not render a personal judgment in such case, at least without very clear expression of legislative authority. Ct. of App., 1873, Schwinger v. Hickok, 53 N. Y., 280.
- 3. The mortgage creditor of a deceased debtor is not compelled, under the statute [1 R. S., 749, § 4], to resort to the land for payment in the first instance, but may, at his option, foreclose the mortgage, or sue the heirs. [28 Barb., 426.] 1873, Rice v. Harbeson, 2 Supreme Ct. (T. & C.), 4.
- 4. The object of the statute was not to interfere with the rights of the mortgage creditor, but to establish an equitable rule among heirs and devisees, and where there are two funds, equity frequently interposes to adjust the remedy to the circumstances disclosed. 1b.
- 5. Under the usual judgment for sale in foreclosure,—directing the referee or other officer making sale, after paying his own fees and expenses of sale, and all liens for taxes, assessments and prior mortgages, to pay from the residue, the costs and the mortgage debt,—if the referee pays the sums awarded out of the residue, before paying off the liens, he does so at his peril. People ex rel. Day v. Bergen, Ante, 97.
- 6. It is the referee's duty to pay off liens as directed by the judgment; and he can not relieve himself of this duty by stipulations in the terms of sale. Ib.
- The rule that a foreclosure is of no avail as against a junior incumbrancer who is not made a party,—applied. Reynolds v. Park, 53 N. Y., 36.

APPEAL, 10; JUDICIAL SALE; MORTGAGE; NOTICE, 5; PARTIES, 48; PLEADING, 16, 17.

FORCIBLE ENTRY.

- In proceedings under the statute for forcible entry and detainer, an affidavit verified in the manner prescribed in section 157 of the Code is insufficient. Such verification is upon information and belief, and does not answer the requirements of the statute. [2 R. S., 508.] 1873, People ex rel. Decker v. Whitney, 1 Supreme Ct. (T. & C.), 533.
- 2. The objection having been taken at the first opportunity before the county judge, it is not waived by the traverse of the inquisition.

FORMER ADJUDICATION.

[13 How., 146; 7 Id., 166; 1 Lans., 231.] The proceedings are summary, and open to technical objections. [24 Barb., 16; 20 Wend., 207.] Ib.

FORM.

- Of contract for the conditional purchase of an interest in an invention. Dykers v. Stuart, 34 N. Y. Superior Ct. (2 Jones & S.), 189.
- Contract for an interest in profits of a share in patent rights. Pelton v. Bulkley, 34 N. Y. Superior Ct. (2 Jones & S.), 283.
- Of complaint against brokers for conversion of stocks. Lyon v. Isett, 34° N. Y. Superior Ct. (2 Jones & S.), 41; S. C., 11 Abb. Pr. N. S., 353; 42 How. Pr., 155.
- 4. Of complaint by wife for judicial separation, on account of cruelty, licentious conduct and the communication of diseases, and for harboring paramour, excessive assertion of marital rights, abusive language, neglect to support, and for interfering with defendant's separate business and property,—corrected on motion. Klein v. Klein, 34 N. Y. Superior Ct. (2 Jones & S.), 48.
- Of complaint and answer in action to determine conflicting claims to real estate. 1872, Ford v. Belmont, 35 N. Y. Superior Ct. (3 Jones & S.), 135.
- 6. Substance of defense that in making the contract sued on, plaintiff used a fictitious partnership name, contrary to the act of 1833. Swords v. Owen, 34 N. Y. Superior Ct. (2 Jones & S.), 277; S. C., with points of counsel, 43 How. Pr., 176.
- 7. Of offer to allow judgment in trade-mark case. Coates v. Goddard, 34 N. Y. Superior Ct. (2 Jones & S.), 118.
- 8. Of order for discovery of books and papers, as to sales, and discounts and allowances thereon. Holtz v. Schmidt, 34 N. Y. Superior Ct. (2 Jones & S.), 28.
- 9. Power of attorney to manage foreign mine for corporation. Hill v. Spencer, 34 N. Y. Superior Ct. (2 Jones & S.), 304.

FORMER ADJUDICATION.

1. In an action for fraudulently entering judgment on a false affidavit of service of the summons, plaintiff put in evidence the report of a referee appointed on a motion to vacate the judgment in the former suit, reciting that it had been referred to him to take testimony and report as to whether the summons was ever served, and that he had taken testimony, and that in his opinion it had not; also an order made by the court on the report of the referee, vacating the judgment. Held, that this was not sufficient to show that the question of whether the summons had ever been served was resadjudicata between the parties. N. Y. Com. Pl., 1873, Alkus v. Rodh, 4 Daly, 397.

GUARDIAN AND WARD.

- In what cases a former judgment is conclusive, as between parties in the relation of warrantor and warrantee, &c. Bissick v. McKenzie, 4 Daly, 265.
- The issue, as well as the evidence, given in the former action, to be considered, in determining whether the judgment is a bar. East N. Y. R. R. Co. v. Elmore, 53 N. Y., 624.
- 4. When there is no conflicting evidence in regard to the liability of a party upon a claim on which a suit is brought, but the question of liability is one of law, solely, the refusal of the jury to allow such claim does not prevent the judgment in the action being a bar to a second action for the recovery of the demand. Supreme Ct., 1873, Marcelius v. Countyman, 65 Barb., 201.
- 5. In an action, by the owner of the fee against the lessee of the life tenant, for waste, a judgment in a former action for waste, upon the same premises, between the same parties, but not for the same acts (the only issue being as to the act of waste), is inadmissible. 1873, Rutherford v. Aiken, 2 Supreme Ct. (T. & C.), 281.
- Questions of law, which have been decided on appeal from a verdict rendered on a feigned issue, are res adjudicata in a subsequent proceeding in the same action. Supreme Ct., 1872, Brown v. Clifford, 7 Lans., 46.
- 7. An order of the court made in supplementary proceedings, giving an allowance to attorneys, is not an adjudication on the value of their services, as between them and their client. Supreme Ct., 1873, Wagener v. Finch, 65 Barb., 493; S. C., as Waggoner v. Finch, 1 Supreme Ct. (T. & C.), 145.

ABATEMENT; JUDGMENT, 9.

FRAUD.

In an action for fraudulent representations, fraud will not be presumed, but must be affirmatively made out by evidence. [51 N. Y., 27; 40 Id., 575; Id., 562; 55 Barb., 547.] N. Y. Superior Ct., 1873, Nelson v. Luling, 46 How. Pr., 355.

Such intent and design can only be proven by facts and circumstances, but one of these must clearly show willful falsehood. Ib.

3. Matters of opinion are not actionable. 1b.

Complaint, 12; Equity, 3; Limitations; Parties, 36, 37, 40; Ques tions of Law and Fact, 20.

GUARDIAN AND WARD.

Where a county judge and surrogate has appointed a general guardian of an infant, without notice to the relatives of the infant residing in the county, and it appears that the relatives would have

HIGHWAYS.

opposed such appointment had notice been served upon them, this court will, upon application, remove such guardian and appoint a new one. Rickard's Case, Ante, 6.

- A guardian should not purchase the dower interest in the lands of his ward, or remove a cloud upon the title of the lands of a ward, without proper application to the court and obtaining an order therefor. 1b.
- The sole executor of the estate of a deceased father is not a proper person to be appointed the general guardian of his orphan child, as it might lead to a gross wrong. Ib.
- 4. An administrator was appointed special guardian of an infant heir of his intestate, to sell the right, title, and interest of the infant in land descended from the intestate to the heir. The land was subject to a purchase-money mortgage to secure a bond given by the intestate and others. Held, that the sale made was a sale of the equity of redemption, only; and the guardian must account for the whole price, and could not defend an action on his bond as guardian, by setting up that he had applied part to pay off the mortgage. Supreme Ct., 1873, Hunt v. Hunt, 65 Barb., 577.

PARTIES, 30, 31, 45;

HABEAS CORPUS.

- A judge at chambers may issue a writ of habeas corpus, notwithstanding the court is at the time in session. Shank's Case, Ante, 38.
- 2. A person committed for contempt in one county and brought into another county on habeas corpus ad testificandum, may be discharged there on a habeas corpus to inquire into the cause of his detention, issued by a justice of the supreme court in the latter county; and this notwithstanding the over and terminer of the former county is in session. Ib.
- 3. The provisions of the habeas corpus act (2 R. S., 560, § 5),—that a prisoner committed on a criminal charge, and brought up on habeas corpus to testify, shall be remanded after testifying,—does not preclude the issue of a writ of habeas corpus to inquire into the legality of his commitment. Ib.
- 4. On habeas corpus the magistrate may inquire into the legality of a commitment for contempt, and if it is not according to law,—e. g., if it is for an indefinite time instead of limited to not exceeding thirty days,—may discharge the prisoner. Ib.

CONTEMPT, 2.

HIGHWAYS.

 Highway commissioners changed the course of a sluiceway crossing and draining a highway, and turned the water on defendant's land.

HIGHWAYS,

Defendant obstructed the sluice, and was sued for a penalty. Held, that if the effect of the change was to destroy his cultivated fields, he might peaceably abate the sluice as a nuisance. His remedy was not confined to an action against the commissioners, but he might prove the injuries to his lands in defense to an action by them for the penalty. Supreme Ct., 1872, Thompson v. Allen, 7 Lans., 459.

- The proceedings prescribed for the discontinuance of highways can not be resorted to for the purpose of reviewing the action of a commissioner in laying out a highway [18 How., 70, 8 Barb., 15].
 1873, People (ex rel. Miller) v. Griswold, 2 Supreme Ct. (T. & C.), 351.
- 3. Where the proceedings to open a highway are regular and valid, and the damages caused thereby have been released, or assessed in accordance with the statute, it is the duty of a commissioner to open a highway, and a mandamus will lie to compel performance. Ib.
- A highway never opened can not be discontinued by the proceedings prescribed by the statute [1 R. S., 502, &c.] for discontinuing old roads. Ib.
- 5. The rule that it is essential to the validity of the commissioner's order that it recite that all met and deliberated, or were duly notified [30 N. Y., 470],—reiterated. Chapman 2. Swan, 65 Barb., 210.
- 6. After an order of a highway commissioner altering a highway has been reversed on appeal by the referees, another commissioner has no power to make the same order within four years from the filing of the referee's decision [Laws of 1847, ch. 455, § 9]. 1873, People v. Jones, 2 Supreme Ct. (T. & C.), 360.
- It was the purpose of this statute to prevent litigation after the decision on appeal [18 How., 70]. Ib.
- 8. The freeholder's certificate is only necessary when the highway is laid out through inclosed, improved, or cultivated land without consent [2 R. S., 5 ed., 395, § 73; H. & Denio, 162; Thompson on Highways, 180]. *Ib*.
- Appeals in encroachment cases are governed by the Code, and the grounds of appeal must be specified in the notice. Griswold v. Buller, 2 Supreme Ct. (T. & C.), 673.
- The widening of a highway is an alteration of it [Hill & D., 162], and no jury is necessary. 1873, People (ex rel. Lasher) v. McNeil, 2 Supreme Ct. (T. & C.), 140.
- Irregularies in proceedings before the commissioner can not be considered on certiorari to the referees [13 Wend., 432; 3 Keyes, 37]. Ib.

INPANT.

. HUSBAND AND WIFE.

- Married woman who upon ceasing to carry on business permits her husband to do so on her credit, may be held liable as if she had a separate business. Ct. of App., 1873, Bodine v. Killeen, 53 N. Y., 93.
- 2. At common law the husband was liable for the wife's debt contracted before marriage. By Laws of 1853, p. 1057, ch. 576, the husband and wife may be joined in an action to recover such debt. 1873, Lennox v. Eldred, 1 Supreme Ct. (T. & C.), 140; S. C., 65 Barb., 410. EVIDENCE; PARTIES, 27-29, 39, 40; WITNESS, 7, 8.

INDICTMENT.

- 1. Under 2 R. S., 699, § 8, imposing additional punishment for a second conviction of felony, an indictment for a second offense must allege a discharge of the prisoner, either upon being pardoned or upon the expiration of his sentence. Alleging merely that he had been duly discharged is a fatal defect; and mere lapse of time will not raise a presumption that the discharge was upon the expiration of the term, so as to cast the burden of proof on the defendant. Ct. of App., 1873, Wood v. People, 53 N. Y., 511; overruling in effect Johnson v. People, 65 Barb., 342.
- Technical rules allowing indictments to be quashed for defects which did not injure the prisoner,—disapproved. Fralich v. People, 65 Barb., 48.
- An indictment for forging and uttering a check, need not set forth a genuine indorsement, nor the revenue stamp. Ct. of App., 1873, Miller v. People, 53 N. Y., 304.
- 4. Upon common-law principles an indictment for embezzlement under the statute, must set out specifically some article of property embezzled. It is not sufficient to state that divers amounts making a specified gross sum were taken. [2 Bishop Crim. Law, § 374.] 1873, People v. Howe, 2 Supreme Ct. (T. & C.), 383.
- An indictment for causing death by abortion, under Laws of 1872,
 ch. 181, is not bad because the offense is laid in another county.
 1873, Davis v. People, 2 Supreme Ct. (T. & C.), 212.

INFANT.

An infant is entitled to protection upon summary application as well as in a formal action. Ct. of App., 1873, Howell v. Mills, 53 N. Y., 322.

ARREST, 10; CONSTITUTIONAL LAW, 2.

INJUNCTION.

INJUNCTION.

- 1. Where the plaintiff has ample remedy at law for breach of covenant, and the damages can be exactly ascertained, and no irreparable injury will be inflicted, and there is nothing which will give rise to a multiplicity of suits, the court will not interfere by injunction to compel defendant to perform his contract specifically; but will leave plaintiff to his remedy at law. N. Y. Com. Pl., 1871, Agate v. Lowenbein, 4 Daly, 62.
- 2. In this case the injunction was refused, on the ground that it did not clearly appear that the purposes for which the premises were used by defendant were a violation of the covenant, as it is only, as a general rule, where the rights of the parties are, or can be, clearly ascertained, and are free from all reasonable doubt that the court will entertain jurisdiction in the first instance to restrain an act by injunction. Ib.
- 3. The lessee of a building, who sublets it, may have an injunction against the erection of an awning, which would be a nuisance to his subtenants, although he is neither owner of the fee, nor an occupant. Tremor v. Jackson, Ante, 115.
- The fact that he has a remedy in damages for a breach of covenant does not preclude an action for an injunction on the ground of nuisance. Ib.
- Injunction lies to prevent an actor who has engaged his personal services for a certain period to plaintiff from performing elsewhere. Montague v. Flockton, 6 Eng. R. (Moak's Ed.), 704; L. R., 16 Eq., 189.
- An injunction does not issue to restrain a party from taking possession of an office and its books and papers, under color of title thereto. Coulter v. Murray, Ante, 129.
- 7. Injunction and receiver refused, in an action by an heir out of possession, seeking partition, and to have executors, &c., removed where title was not clear, and moving affidavits were not positive, and were fully denied. Patterson v. McCunn, 46 How. Pr., 182.
- 8. An injunction will not be granted against broker to prevent sale of customer's stocks. The remedy is at law. 1874, Park v. Musgrave, 2 Supreme Ct. (T. & C.), 571.
- Under the Revised Statutes, a person giving securities upon a
 usurious loan is entitled to an injunction restraining their prosecution, irrespective of section 219 of the Code. Wheelock v. Lee,
 Ante, 24.
- 10. The courts of this State will not enjoin a non-resident party from prosecuting an action in the forum of his own residence. It is no

INJUNCTION.

bar to an action in another State, that the plaintiff there is defending his rights in an action brought here by other parties. 1873, Barry v. Mutual Life Ins. C., 2 Supreme Ct. (T. & C.), 15.

- 11. The provisions of 3 R. S., 270, § 72 (5th ed.), which provide that no injunction shall issue to stay proceedings at law in a personal action after judgment, unless a sum of money shall be deposited, and a bond given as therein directed, apply to a suit brought in this court to restrain the collection of a personal judgment rendered in one of the district courts; and a compliance with the statute is necessary to give the court jurisdiction to grant a preliminary injunction. N. Y Com. Pl., 1871, Gray v. Redfield, 4 Daly, 95.
- 12. The facts that a tax had been collected from plaintiff without authority of law, and that there was danger it would be devoted to an unlawful purpose, are not sufficient to enable him to maintain an action for an injunction restraining its disbursement, where the commissioners holding the tax were admittedly responsible. Supreme Ct., 1873, Kilbourne v. Allyn, 7 Lans., 352.
- 13. An injunction lies to restrain the persistent commission of trespasses even of a mere personal nature, where they affect a corporate franchise. Stage Horse Cases, *Ante*, 51.
- 14. The court, in an action brought by incorporated stage companies engaged in the carriage of passengers, will not enjoin the society for prevention of cruelty to animals from arresting the drivers or servants of the companies, but may enjoin them from stopping the vehicles, except for purpose of an arrest in a clear case of violation of the law, and from taking custody of the horses or vehicles, or interfering with the passengers. Such an injunction having been issued, the stopping of a stage for purpose of arresting the driver in a case in which the horse was actually lame at the time,—Hebl, not a violation of the injunction, although upon subsequent trial of the driver, on a charge of cruelty, he was acquitted. 1b.
- 15. Where the officers of the society have, on conceded facts, clear evidence on which to base a sound judgment that an offense is committed, they should not be punished as for contempt in violating such injunction, but the other party must be left to an action for damages. Ib.
- 16. Equity will restrain, by perpetual injunction, a party claiming an exclusive right to sell under a particular trade-mark which is the general name of a certain kind of merchandise, from interfering by injunction, circulars, or threats made to customers, with the trade of another who uses the same designation. Supreme Ct., 1873, Wolfe v. Burke, 7 Lans., 151.
- 17. As a general rule geographical names can not be appropriated as trade-marks, and their use by another will not be enjoined; but the

INTERPLEADER.

rule has its exceptions, where the intention in the adoption of the descriptive word is not so much to indicate the place of manufacture, as to intrench upon the previous use and popularity of another's trade-mark. Leav. Wolfe, Ante, 1.

18. An injunction does not lie to restrain the trustees from expending more than is necessary for support, &c., of the cestui qui trust. Ib. Han v. Van Voorhis, Ante, 79.

Action, 5; Bankruptey; Costs, 18; Damages, 22; Landlord and Tenant; Parties, 34.

IMPRISONMENT.

A person adjudged to be in contempt, and taken to jail under a commitment which is illegal, can not be held by subsequently making out a legal commitment. Shanks's Case, Ante, 38.

INSANE.

Test of insanity in criminal cases. Flanagan v. People, 52 N. Y., 467.

INSURANCE COMPANY.

- An action does not lie by a stockholder of a mutual life insurance company, formed under the act of 1853, to declare the franchise forfeited, and enjoin its exercise, and have a receiver appointed, on the ground that defendants made a false annual statement, in violation of the act of 1853. Fisher v. World Mutual Life Ins Co., Ante, 363.
- 2. The penalty prescribed by section 18 of the act of 1853, for any violation of the act, may be recovered in the name of the people, and a dissolution may be sought through the attorney-general in the case of insolvency; but the provisions of 2 R. S., 463, §§ 39, 40, that any corporation having banking or insurance powers, &c., which violates any act binding on it, may be enjoined at suit of a creditor or stockholder, &c., do not apply to violations of the provisions of the act of 1853, in reference to annual statements, or in reference to any matters specially provided for in the act of 1853. Ib.
- 3. The stockholder's remedy for any violation of these kinds is by causing the district attorney to sue for the penalty. Ib.

INTERPLEADER.

 An action in the nature of interpleader does not lie, where the plaintiff is a wrongdoer, although the wrong was not against the real owner, but against one who rightfully claimed possession before

JUDGMENT.

the real owner appeared. 1873, N. Y. & Harlem R. R. Co. v. Haws, 35 N. Y. Superior Ct. (3 Jones & S.), 372.

2. Other grounds which preclude an action in the nature of an interpleader,—stated. Ib.

3. But compare Tauton v. Groh, 4 Abb. Ct. App. Dec., 358.

 In what cases it may be ordered. Barry v. Mut. Life Ins. Co., 53 N. Y., 536.

JOINT STOCK COMPANY.

In an action against the members of a joint stock association, to charge them individually, after exhausting remedy against the association, the judgment which plaintiff recovered in his suit against the president, under the statute, is admissible in evidence, if it appears by the record that the real defendant therein was the association sued by the name of the president. 1873, Nat. Bank of Schuylerville v. Lasher, 1 Supreme Ct. (T. & C.), 313.

JUDGE.

Not incompetent to act under a statute power. People ex rel. Washington v. Nichols, 52 N. Y., 478.

JUDGMENT.

- A factor having a lien upon goods for the amount of his advances, can, in an action against a creditor of his principal, who has taken the goods under attachment, recover only the value of his special property in the goods. He is not entitled to a judgment for the whole value of the goods. N. Y. Com. Pl., 1871, Heard v. Brewer, 4 Daly, 136.
- 2. The presumptions in favor of the jurisdiction of a superior court of general powers, whose judgment is set up, applies as against infant defendants. And where the record recites that affidavits were read and filed proving the service of the summons in the action, but without saying expressly upon all the defendants, and recites the putting in of an answer by a guardian ad litem for the infant defendants, jurisdiction of the person will be presumed unless evidence to the contrary is given. If the judgment was in an action under the Code, such defendants as voluntarily appeared, and such as answer, are bound equally as if there were proof of service on them. Ct. of App., 1873, Bosworth v. Vandewalker, 53 N. Y., 597.

JUDGMENT.

- 3. A transcript from the plaintiff's attorney's register, implying that no service was made by him, and that he did not employ any one to make service, but that he left the summons with the attorney for defendant, does not show necessarily that no service was made. Ib.
- 4. Whether, if it appear that there was no service of process upon infants, the appointment of a guardian, and an answer by him, would give jurisdiction,—query. 1b.
- Genuine papers filed in the action may be received in evidence in support of the jurisdiction, although not by law part of the judgment roll. Ib.
- 6. Recovering a judgment merges or extinguishes the cause of action only against the party sued, not another cause of action, though upon the same facts, against another party in no wise joined in liability. Ct. of App., 1873, Atlantic Dock Co. v. Mayor, &c., of New York, 53 N. Y., 64.
- 7. Where plaintiff sues on contract, instead of for fraud,—to recover for property obtained by fraudulent representations,—and recovers judgment, the judgment merges the cause of action, and he will be estopped from setting up the debt, as on contract, under the bankrupt law. 1871, Shuman v. Strauss, 34 N. Y. Superior Ct. (2 Jones & S.), 6. But see 52 N. Y., 404.
- 8. In an action on a contract to pay money in instalments, where defendant set up breaches of the contract on the part of plaintiff at specified times, and plaintiff recovered,—Held, that the judgment was conclusive, in a subsequent action to recover later instalments, and precluded defendant from alleging any other breaches subsequent to those alleged in the first action. 1871, De Wolf v. Crandall, 34 N. Y. Superior Ct. (2 Jones & S.), 14.
- 9. A judgment of a sister State, set up in the courts of this State, may be impeached by showing that defendant was never served with process, and that the attorneys who appeared for him were not authorized to do so. And the fact that the defendant applied to the foreign court to have the judgment set aside, and that his motion was denied, does not make the question of jurisdiction, res adjudicata. 1872, Howard v. Smith, 35 N. Y. Superior Ut. (3 Jones & S.), 131.
- 10. Where two parties are separately sued for the same wrong, there being no privity between them, a recovery against, or payment by, one, is not a bar to a subsequent recovery against the other. Ct. of App., 1873, Atlantic Dock Co. v. Mayor, &c., of New York, 53 N. Y., 64.
- 11. An action brought by an administrator upon a judgment obtained by his intestate is not an action between the same parties, within

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- section 11 of the Code. [6 How., 372; 12 Id., 537; 45 Id., 428.] 1874, Smith v. Button, 2 Supreme Ct. (T. & C.), 498.
- 12. The words "the same parties," as used in that section, have a very definite signification, and the courts have not been disposed to extend their meaning. [29 How., 218; 4 Rob., 239; 1 Abb., 83; 29 Barb., 295.] 1b.
- 13. Where, in an action not on a joint liability, one defendant demurs, and the other answers, and the demurrer is sustained with costs, judgment may be immediately entered for the costs; and the time to appeal therefrom to the court of appeals, will be limited to two years, irrespective of the litigation with the other defendants. Camblos v. Butterfield, Ante, 197.
- 14. When the general term reverse with costs a judgment for frivolousness of the answer, and give plaintiff leave to plead, &c., a judgment for costs can not be entered. The proceeding is interlocutory, and the costs are to be collected as interlocutory costs. Ct. of App., 1873, Wilkin v. Raplee, 52 N. Y., 248.
- 15. A judgment will not be set aside for a mere irregularity in practice,—e. g., including costs, on a recovery against an administrator, without leave of court. It must be made to appear that a wrong has been done, before the court will interfere. 1873, Hees v. Nellis, 1 Supreme Ct. (T. & C.), 118; S. C., 65 Barb., 441.
- Remedy for a clause improperly inserted, is by motion, not by appeal. Ct. of App, 1873, People ex rel. Oswald v. Goff, 52 N. Y., 434.
- Judgment against president of an association only prima facie evidence in action against members of the association. Allen v. Clark, 65 Barb., 563.
- 18. The lien of a judgment upon the estate of a life tenant, is subject to be divested by the judicial announcement of a breach of a condition which determines the estate. Ct. of App., 1873, Moore v. Pitts, 53 N. Y., 85.
- 19. Effect of an agreement that forbearance should not prejudice the lien of a judgment but the creditor should be entitled to payment out of future proceeds. 1873, Belmont v. Ponvert, 35 N. Y. Superior Ct. (3 Jones & S.), 208.
- 20. Where a conveyance of land is found to be void as against a judgment creditor of the grantor, all the judgment he is entitled to, is a sale of the land and payment of the amount of his judgment, not a judgment declaring the conveyance null and void as to every one.

 Supreme Ct., 1873, Orr v. Gilmore, 7 Lans., 345.
- 21. A creditor may assail collaterally for fraud a judgment against his debtor. Supreme Ct., 1866, Spicer v. Waters, 65 Barb., 227.
- Although a report of a referee, made in 1870, directing payment in coin of a bond made in 1859, was correct when made [12 Wall.,

JUDICIAL SALE.

457], it is erroneous now. [14 Wall., 297.] 1873, Smith v. Smith, 1 Supreme Ct. (T. & C.), 63.

AMENDMENT, 5; ANSWER, 1; APPEAL, 5, 29, 37-39, 43, 58, 60; Assignment, 2; Bankruptcy, 5; Building Laws; Costs, 7, 17, 26; Error, 5; Justices' Court, 3-7; Stipulation, 3.

JUDICIAL SALE.

- 1. Although the terms of sale permit the purchaser to pay off the liens, and retain the sum out of the purchase-money, he is not bound to do so, but may pay the whole price and require the referee to execute the judgment. People ex rel. Day v. Bergen, Ante, 97.
- 2. If the purchaser claims that he has paid off admitted prior liens, and tenders the balance of the purchase-money, an objection to the sufficiency of the proof of the payment must be made by the referee, if at all, at the time of the tender. Ib.
- If the referee refuses to pay off or allow such prior liens, the court may compel him to do so. Ib.
- 4. A purchaser at a judicial sale, under a judgment of the supreme court, in foreclosure, obtains a good title, even though an appeal has been taken from the judgment, and it is afterwards reversed, provided no stay of proceedings has been obtained upon the appeal. N. Y. Com. Pl., Sp. T., 1873, Hening v. Punnett, 4 Daly, 543.
- Nor does it make any difference that the purchaser is a party to the foreclosure suit. Ib.
- 6. A judgment of a court having jurisdiction of the subject-matter and of the parties, is a complete protection to a purchaser under it, whether he be a party to the judgment or not. Ib.
- 7. A purchaser of real estate at a judicial sale is entitled to a satisfactory record title; and if it is derived under a will, he can claim that the will should have been duly admitted to probate; and the parties insisting on his taking the title must show not only that the will has been admitted to probate, but also that the surrogate admitting it had jurisdiction of the heirs-at-law of the testator. Thorn v. Shiel, Ante, 81.
- 8. Although the rule might be doubted on general principles, it must be deemed settled by Walker v. White (36 Barb., 592), and Chatauqua Co. Bank v. White (6 N. Y., 236), and the Same v. Risley (19 N. Y., 369), that no title will pass by the deed of a referee in a creditor's suit, unless the debtor, or other persons, holding the legal title, conveyed to the referee, or joined in the conveyance; and a decree in such a suit authorizing conveyance by a referee or master, without any conveyance from the parties holding the legal title, is void in such sense that a purchaser from

JURISDICTION.

the referee obtains no title. Supreme Ct., 1873, Dawley v. Brown, 65 Barb., 107.

- 9. Pending proceedings to foreclose a mortgage, plaintiff agreed with the mortgagor to purchase the premises on account of defendant. At the sale the premises were bid in for a small sum by a son of plaintiff, and judgment for deficiency entered against the mortgagor. Held, that under the agreement the sale could not be allowed to stand. [1 Barb., 370.] 1874, Crane v. Stiger, 2 Supreme Ct. (T. & C.), 577.
- 10. The laches of defendant in omitting to move for relief only affected the terms upon which he would be relieved. Ib.
- 11. The purchaser, by his purchase, submitted himself to the jurisdiction of the court, for all purposes relating to him in that character, as if he had been a party to the suit. [2 Paige, 341; 36 N. Y., 677.] Ib.
- 12. Negligence of the plaintiff is not necessarily ground for refusing his motion to rescind a judicial sale, if it does not appear that it is in the power of either party to supply unquestioned defects in the title. Supreme Ct., 1873, Parisen v. Parisen, 1 Supreme Ct. (T. & C.), 642; S. C., 46 How. Pr., 385.
- Speculative value not ground for resale. Barnes v. Stoughton, 2 Supreme Ct. (T. & C.), 675.
- 14. The owner of the equity of redemption of premises sold on fore-closure, when not made a party to the suit, and having no notice of its pendency, can not be made to bear the loss resulting from a resale, made necessary by negligence in the conduct of the action, especially where the vitiating defect is the omission to make him a party; no portion of such loss therefore can be deduced from his his interest in surplus moneys arising from the second sale. Ct. of App., 1873, Raynor v. Selmes, 52 N. Y., 579; reversing 7 Lans., 440.

MONEY PAID; NOTICE, 5.

JURISDICTION.

1. Conceding that the United States courts have exclusive jurisdiction over maritime torts, and that placing obstructions in navigable waters is such a tort, still the legislature may confer upon municipalities, police authority over their adjacent navigable waters and harbors; and a violation of any ordinance adopted by the municipal authority, within the power conferred, is within the jurisdiction of the State courts. And an act of the legislature authorizing the passage of such an ordinance is valid. Supreme Ct., 1872, City of Ogdensburg v. Lyon, 7 Lans., 215.

JUSTICES' COURT.

- It is a general rule as to jurisdiction, that conferring it upon one court does not oust other courts before possessing it; for concurrent jurisdiction is not inconsistent. [2 Hill, 164.] Ct. of App., 1873, Cooke v. State Nat. Bank of Boston, 52 N. Y., 96.
- 3. The supreme court has jurisdiction of an action against a foreign corporation for a cause of action which did not arise in this State, unless the corporation takes objection to the jurisdiction before an unqualified appearance. A voluntary and unqualified appearance, such as appearing generally and answering to the merits, gives jurisdiction.* Supreme Ct., 1873, Carpenter v. Mintum, 65 Barb., 293.
- A State court has jurisdiction of an action by an assignee in bankruptcy to set aside a transfer of property made in fraud of the U. S. bankrupt act. Supreme Ct., Sp. T., 1872, Gilbert v. Crawford, 46 How. Pr., 222.

EVIDENCE, 3.

JUSTICES' COURT.

- 1. If a justice erroneously receives evidence of a defense arising subsequent to the commencement of the action, which is not pleaded by supplemental answer, he can not subsequently reject the evidence, after the conclusion of the trial, to the prejudice of the defendant. Supreme Ct., 1873, Hall v. Olney, 65 Barb., 27.
- The rule that a plea of title is no bar to an action in a justice's court for an encroachment on a highway [Parker v. Van Houten, 7 Wend., 145; Fleet v. Youngs, Id., 291],—followed. Chapman v. Swan. 65 Barb, 210.
- A judgment entered within twenty-four hours of the rendition of a verdict by the jury, is a compliance with the statute [2 Edw., 328, 2 R. S., 575, § 85], and, therefore, where the verdict of the jury was received "about midnight," and entered in the judge's minutes, and at daylight next morning the judge entered the judgment in his docket, the judgment was valid. 1873, Goodrich v. Sullivan, 1 Supreme Ct. (T. & C.), 191.
- 4. A judgment entered as follows, "5th, damages \$30.00, \$4.60," the return stating the \$4.60 was entered as costs, is in form sufficient to constitute a judgment. [Overruling Stephens v. Santee, 51 Barb., 532.] Ib.
- 5. The rule [18 Wend., 558] that a justice can not alter the amount of a judgment after it is entered on his docket, and if altered it must

^{*} The report is defective, no statement of the pleadings being given; but an examination of the record shows that the above was the point decided.

JUSTICES' COURT.

be held to be a judgment for the amount for which it was originally entered,—reiterated, 1873, Rose v. Depue, 1 Supreme Ct. (T. & C.), 16.

- 6. Upon a trial before a justice of the peace, the jury rendered a verdict in favor of plaintiff. Plaintiff was not called, nor was he present when the verdict was received by the justices. Held, error for which the judgment must be reversed on defendant's appeal. [14 Barb., 381; 3 R. S., 5 ed., 443, §§ 101, 110; 21 Wend., 305; 3 Denio, 78; 3 Hill, 7\(\theta\).] 1873, Board of Excise v. Turk, 2 Supreme Ct. (T. & C.), 367.
- 7. Plaintiff brought an action to recover fifty dollars, and defendant denied the cause of action, and set up a counter-claim for a like amount, and recovered judgment for that sum. Plaintiff appealed, claiming judgment in his favor for fifty dollars besides costs. Upon trial in the county court before a jury, a verdict of no cause of action was rendered. Held, defendant was bound to make no offer, and that he was entitled to costs. 1874, Church v. Miller, 2 Supreme Ct. (T. & C.), 583; S. C., 46 How. Pr., 525.
- 8. In a notice of appeal from a justice's court, a statement that "the justice erred in allowing incompetent evidence," is wholly insufficient. [2 Sandf., 632; 1 Code R., 103; 15 How. Pr., 32; 18 Wend., 550.] 1873, Delong v. Brainard, 1 Supreme Ct. (T. & C.), 1.

So of a statement that the judgment is unsupported by evidence. Ib.

Compare Nolan v. Page, 1 Supreme Ct. (T. C.), Adden., 2.

- 9. Upon an appeal from a justice's judgment to the county court, a notice which contains one good ground is sufficient, under the statute as to costs, although other grounds are not sustained. [63 Barb., 99; 47 N. Y., 99.] Supreme Ct., 1873, Bixby v. Warden, 46 How. Pr., 239.
- 10. Section 371 of the Code applies to all cases of appeal from a judgment of a justice's court, where a new trial is to be had;—to appeals upon a question of fact, as well as law. Ib.
- 11. In an action of trover in a justice's court, plaintiff recovered one hundred dollars. Upon appeal to the county court, where a trial was had, he recovered eighty-three dollars and eighty-eight cents. Held, defendant was entitled to costs of appeal. Ib.
- 12. An affidavit stating that defendant is about to depart from the county, and also that he is about to remove his goods therefrom, &c., is sufficient for issuing an attachment, both under 2 R. S., 230, § 26, and Laws of 1831. But it may be inferred, if material, when the summons and subsequent proceedings were in conformity with the latter act, that the attachment was issued thereunder. Supreme Ct., 1872, Reinmiller v. Skidmore, 7 Lans., 161.
- 13. A bond approved by a justice, given on issuing an attachment, is

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sufficient to uphold his jurisdiction as against a stranger to the proceeding, although a mistake was made in the condition of it. [31 N. Y., 595.] Whether the defendant in the attachment waived the defect, it seems, is the test whether it was a nullity or mere irregularity. [26 N. Y., 418.] Ib.

14. Parol evidence of an execution and a sale thereunder having been admitted without objection, it is too late to raise the objection on appeal. Ib.

JUSTICES OF THE PEACE.

The provision of the constitution [Art. 6, § 13] limiting the tenure of certain judicial officers, has no application to justices of the peace. [45 N. Y., 820.] 1873, Dohring v. People, 2 Superior Ct. (T. & C.), 458.

Even if a justice who has passed the prescribed limit were not a
member of the court convicting a prisoner as de jure justice, if he
was de facto justice and a member of such court, this is sufficient.

[23 N. Y., 296; 24 Wend., 525.] Ib.

LANDLORD AND TENANT.

- 1. The erection, on the sidewalk, of a permanent awning, screwed to the house, is a violation of a covenant not to make any alteration in the house. Trenor v. Jackson, Ante., 115.
- Such a breach of covenant, however, is not ground for an injunction at the suit of the lessor, especially where the lease reserves a right of re-entry for breach of covenant. Ib.

COSTS, 4; COUNTER-CLAIM, 2; SUMMARY PROCEEDINGS.

LEASE.

The dispossession of the tenant, by summary proceedings, for non-payment, &c., does not impair the lessor's right of action against him for breach, during the quarter prior to the dispossession. of covenant to pay a tax. 1873, Johnson v. Oppenheim, 35 N.Y. Sup. Ct. (3 Jones & S.), 440.

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- A cause of action held not barred until six years after formal demand and refusal, although payment and previous requests for a return of the pledge took place more than six years before the action was brought. Roberts v. Berdell, Ante, 177.
- Demand and refusal are evidence of a conversion at the time of the refusal. 1b.
- 8. A part payment derived from a collateral security, and without the

LIMITATIONS.

assent of the debtor to it as a payment, is not alone sufficient as a new promise. Ct. of App., 1873, Harper v. Fairley, 53 N. Y., 442.

- To render the statute of limitations available as a bar to a counterclaim, it must be pleaded, by reply. Williams v. Willis, Ante, 11.
- An amendment can not be allowed on appeal, so as to sustain a
 judgment for plaintiff, in such case, if he neglects to reply. Ib.
- 6. Where the cause of action arose before the Revised Statutes, no lapse of time will prevent a court of equity from giving relief, where the fraud is clearly established. Supreme Ct., 1872, Prindle v. Beveridge, 7 Lans., 225.
- Statutes of limitations contained in the Revised Statutes do not apply to cases where the cause of action accrued before the Revised Statutes went into effect. 1b.
- 8. Where letters testamentary were issued to the executor, and at the same time letters of administration, with the will annexed, of a deceased devisee who had become personally liable by acceptance of the devise for a legacy charged on the devised property. Held, that the executor's only action for the legacy was in equity, and a suit commenced within ten years, was in time to save the statute of limitations. Supreme Ut., 1873, Salisbury v. Morss, 7 Lans., 359.
- Actions for specific relief in equity are now to be brought within ten years, except as provided in section 91, subd. 6, of the Code. 1b.
- The failure to appoint an executor does not prevent the statute of limitations from running. Supreme Ct., Sp. T., 1871, Dunham v. Sage, 7 Lans., 419; affirmed in 52 N. Y., 419.
- 11. An action by the executors, to set aside conveyances made by the testator through the undue influence of his brother, is not barred for any less delay than that specified in the statute of limitations. Nor will acquiescence be readily inferred where plaintiffs were, in a great measure, in defendants' power, and the evidence was difficult to obtain. 1873, Platt v. Platt, 2 Supreme Ct. (T. & C.), 25.
- 12. An action to set aside a fraudulent conveyance is barred after the lapse of six years from the time when the fraud was discovered. [37 N. Y., 657; 1 Hoff. Ch., 156; 15 N. Y., 505; 3 Sandf., 482; 41 N. Y., 164.] 1874, Taft v. Wright, 2 Supreme Ct. (T. & C.), 614.
- 13. An action to compel the surrender and cancellation of municipal bonds claimed to be void, because the conditions of the statute had not been complied with, is not an action for relief on the ground of fraud; and the six years' limitation applies. 1873, Town of Venice v. Breed, 1 Supreme Ct. (T. & C.), 130; S. C., 65 Barb., 597.

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- 14. An action to redeem a mortgage is within section 97 of the Code [3 Barb. Ch., 199; 5 Lans., 51], and no exception exists in favor of married women [Laws of 1870, ch. 741, §§ 5, 15]; and the cause of action accrues as soon as the purchaser of the mortgaged premises enters into possession under the foreclosure sale [50 N. Y., 357;] 1874, Depew v. Dewey, 2 Supreme Ct. (T. & C.), 515; S. C., 46 How. Pr., 441.
- 15. Courts will not grant relief after a party has lost his rights by lapse of time under a statute bar. To do so would accomplish by indirect means what the legislature had provided should not be done by any means [13 How. Pr., 93; 16 Id., 385; 1 Kern., 274; 22 N. Y., 319; 27 Id. 638]. *Ib*.
- 16. In section 101 of the Code of Procedure, —which enumerates disabilities which suspend the statute, namely, infancy, insanity, imprisonment for crime, and (until the recent amendment), marriage; with a proviso that the period within which the action must be brought can not be extended more than five years by any such disability, except infancy, nor can it be so extended in any case longer than one year after the disability ceases,—the last clause of the proviso applies, not only to infancy, but to the other disabilities mentioned. Thus, marriage only allows a disability of five years, no matter how long coverture continues. Where the coverture ceased by the death of the woman nearly five years after the cause of action accrued.—Held, that the executors must sue within one year thereafter. Ct. of App., 1873, Dunham v. Sage, 52 N. Y., 229; reversing 5 Lans., 451; and affirming 7 Id., 419.
- 17. Mere cross demands, such as bills and notes set up as counterclaims, against plaintiff, in an action for goods sold, &c., do not constitute an account within the statute of limitations, Code, section 95. 1873, Perrine v. Hotchkiss, 2 Supreme Ct. (T. & C.), 370.
- 18. The right of action of cestuis qui trust, to set aside a purchase of the trust estate by the trustee, is subject to the operation of the statute of limitations, and expires in ten years from the time at which it accrued. The time during which the trustee continued to act as such is not to be deducted. The cause of action must be deemed-to accrue at the time when the trustee took possession of the premises so purchased, and notoriously held them as his own.

 Ct. of App., 1873, Hubbell v. Medbury, 53 N. Y., 98.
- 19. While limitations of the time within which to bring an action on a policy of insurance are valid, they are regarded with extreme jealousy by the courts, and may be waived by any act or declaration which induces the assured to wait. [14 N. Y., 253; 5 Lans., 275; 10 Abb., 316; 39 N. Y., 45.] 1873, People v. Liverpool, London, &c., Ins. Co., 2 Supreme Ct. (T. & C.), 268.

MANDAMUS.

20. Where the only objection to a claim on a policy is purely formal and technical, and no hint is given that the claim is involved, a disputed claim is not made out, and the limitation of the time within which to bring an action on a disputed claim does not apply. 1b.

21. It seems, that proceedings to revive and continue actions are within the purview of the statute of limitations, and are barred by lapse of time. Ct. of App., 1873, Beach v. Reynolds, 53 N. Y., 1.

MALICIOUS PROSECUTION.

- A complaint presented to a magistrate, which results in his sending a letter to the accused, requesting him to call and explain the charge, although it be maliciously made, it is not ground for an action for malicious prosecution. Newfield v. Copperman, Ante, 360.
- In an action for malicious prosecution for felony, evidence of what took place on a settlement between the parties is inadmissible. 1873, Van Voorhes v. Leonard, 1 Supreme Ct. (T. & C.), 148.
- The parties could not lawfully compound a felony, and such a settlement could not be recognized. Ib.

FALSE IMPRISONMENT; QUESTIONS OF LAW AND FACT, 4, 5.

MANDAMUS.

- 1. To entitle the relator to the writ, he should make a case clearly showing his right. Thus, in a mandamus against a religious corporation, alleging that the relator was a member of the church, and that the church removed him from office and from membership without giving him notice of trial, is not sufficient without showing that he held any office in the corporation. Ct. of App., 1873, People ex rel. Ditcher v. German U. Ev. Ch., 53 N. Y., 103; reversing 6 Lans., 172; and affirming 3 Id., 434.
- 2. The provision of 2 R. S., 587, section 57,—that on a verdict for relator on issue taken on the return to an alternative mandamus, relator shall recover damages and costs, and a peremptory writ be granted without delay,—does not authorize the issue of peremptory writ where the record shows no legal right because of a mistake in the return in matters of fact, resulting in a verdict for the relator. The true rule is that at any time after a return, and before a peremptory mandamus is awarded, defendant may object to a want of sufficient title in the relator to the relief sought, or show any other defect of substance, though he can not after return object to defects in form. The object of the statute was to dispense with an action for false return. [28 N.Y., 112; 10 Wend., 25, and explaining 26 N. Y., 316.] Ct. of App., 1873, People (ex rel. Dunkirk, &c. R. R. Co.) v. Batchelor, 53 N. Y., 128.

MARINE COURT.

- An alternative mandamus being in the nature of an order to show
 cause, any cause or defense which exists at the time fixed for
 showing cause is an answer to the writ. 1873, People v. Com'r. of
 Reading, 1 Supreme Ct. (T. & C.), 193.
- Not to be denied merely because an order previously made for payment of part of the claim has never been obeyed. Ct. of App., 1873, People ex rel. Kingsland v. Palmer, 52 N. Y., 83.

NEW YORK, 2, 4.

MANUFACTURING CORPORATIONS.

- 1. A general superintendent of a mine is a "servant" within the statute [3 Robt., 316], although it does not appear that he ever worked with the men [49 Barb., 294]. And it seems that the judgment roll in the action against the company may be resorted to as sufficient evidence that the original debt was payable within one year. 1872, Hill v. Spencer, 34 N. Y. Superior Ct. (2 Jones & S.), 304.
- Obtaining judgment against the corporation and attempting to collect it, does not affect the creditor's right to hold stockholders individually liable. 1873, Deming v. Puleston, 35 N. Y. Superior Ct. (3 Jones & S.), 309.
- 3. To maintain an action against a stockholder, the necessity of a previous execution unsatisfied against the corporation, if it be required by the statute, is dispensed with, where it is rendered impossible by proceedings under the bankrupt act instituted by the stockholder himself. Ct. of App., 1873, Shellington v. Howland, 53 N. Y., 371.
- Remedy of creditors against stockholders, &c. Johnson v. Underhill, 52 N. Y., 203.

MARINE COURT.

- 1. In the provisions of the Code of Procedure relative to appeals from judgments of the marine court (sections 351 to 371 inclusive), the term "justice" is used as a correlative, or of equivalent meaning, with the various terms "marine court," "assistant justices' courts of New York city," and "justices' courts of cities," or as synonymous with the term "the court below." N. Y. Com. Pt., 1872, Boomer v. Brown, 4 Daly, 229.
- 2. Under the provisions, therefore, of section 371 of the Code of Procedure in regard to costs, on appeal to the common pleas,—which provide that "wherever costs are awarded to the appellant, he shall be allowed to tax, as part thereof, the costs and fees paid to the justice on making the appeal, as disbursements, in addition to the

MECHANIC'S LIEN.

costs in the appellate court; and when the judgment in the suit before the justice was against such appellants, he shall further be allowed to tax the costs incurred by him, which he would have been entitled to recover in case the judgment below had been rendered in his favor; "—on an appeal from a judgment of the general term of the New York marine court, the appellant on reversal may tax as costs the fee paid to the clerk of the marine court for making the return, and also the costs incurred by him which he would have been entitled to recover in case the judgment in the marine court had been in his favor. Ib.

- The case of Ellert v. Kelly (4 E. D. Smith, 12) distinguished and explained. Ib.
- 4. On execution from the N. Y. marine court, a marshal took chattels, one of which his men pawned, and the auctioneer, employed by the marshal, redeemed it, and refused to deliver it without being reimbursed. Held, that the marine court had not power to determine the right to possession on summary application without action. People ex rel. Walters v. Conner, Ante, 430.

MECHANIC'S LIEN.

- 1. Where, after part of the work called for by a contract made by several joint contractors, has been finished and paid for, and the contract abandoned, if one of the joint contractors, by a new arrangement with the owner, goes on and completes the work, he may file a lien in his own name therefor; and the fact that he subsequently takes an assignment from the other original joint contractors, does not show that they were interested, and were necessary parties, Hubbell v. Schreyer, Ante, 300.
- 2. An ambiguity in the introduction of the notice, in describing the claim as being against one person, instead of as against two, may be cured by reference to a full and accurate statement of the claim in subsequent parts of the notice. *Ib*.
- 3. The mechanic's lien law is to be treated as a remedial statute; and though it is to be strictly construed so far as to require substantial compliance with every material provision by which the property of a third person may be incumbered by the mere act of the claimant, yet it is to be construed not so strictly as to deprive creditors of the benefit intended to be conferred. Ib.
- 4. A mistake in a notice filed under the act of 1863,—e. g., not naming all the debtors,—may be deemed cured by the provision of section 2, of the act, that no variance shall impair the claimant's right, but relief shall be given according to the evidence. Ib.
- In a proceeding under that act, the court may give a personal judgment against the owner, if the debt was his proper debt. Ib.

MISTAKE.

- 6. A mis-statement in the notice of lien, as to the person against whom the claim was made, does not necessarily vitiate, if the owner's name is stated, and the contractor's name appears by the complaint and answer. Ct. of App., 1873, Morgan v. Chase, 52 N. Y., 346.
- Several contiguous buildings, of one owner, may, as against him, be treated as one building, and a single lien filed and foreclosed against him. 1b.
- 8. Purchasers holding a contract for a conveyance and a building loan, assigned the contract, and the assignee reassigned to them the right to a conveyance, but proceeded to build, and employed a contractor. Held, that the latter could file a lien as against the vendors. They continued to be the owner, within the Kings and Queens counties' act. [Laws of 1862, ch. 478.] Hart v. Wheeler, 1 Supreme Ct. (T. & C.), 408.
- Under the mechanic's lien law for New York city [Laws of 1863, ch. 500], the "owner" intended is the owner of the erection, and not of the lands on which it is placed. N. Y. Com. Pl., 1871, Muldoon v. Pitt, 4 Daly, 105; affirmed in 54 N. Y., 269.
- Under the lien law [Laws of 1854, ch. 402], the laborer can obtain a lien only for labor performed within thirty days immediately preceding the filing of notice of lien. [35 N. Y., 94.] 1873, Goodale v. Walsh, 2 Supreme Ct. (T. & C.), 311.
- 11. The question of costs is in the discretion of the court [Laws of 1873, ch. 489, § 18]. Ib.
- 12. The act of 1862 as to Kings county [Laws of 1862, ch. 478, § 1], is sufficiently comprehensive to allow a lien for flagging sidewalk. Ct. of App., 1873, Morgan v. Chase, 52 N. Y., 346.
- 13. If the referee reports merely for a sale, the remedy for the error of inserting a personal judgment in the record, is by motion, not by appeal to the court. Ib.
- 14. The court will not, and it seems, can not, on motion, discharge a lien, or reduce the claim, on the ground that the notice was filed three months after the work had been done and the materials furnished, if the parties have pleaded to issue and gone to trial in proceedings to enforce the lien. Matter of Lien on 740 Broadway, Ante, 335.

MINISTERIAL ACT.

Distinguished from judicial act. People ex rel. Oswald v. Goff, 52 N. Y., 434.

MISTAKE.

1. The mistake which will warrant a court of equity in reforming a

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written contract, must be one made by both parties to the agreement, so that the intentions of neither are expressed in it; or it must be the mistake of one party by which his intentions have failed correct expression, and there must be fraud in the other party, in taking advantage of that mistake and obtaining a contract with the knowledge that the one dealing with him is in error in regard to what are its terms. Ct. of App., 1873, Bryce v. Lorillard Fire Ins. Co., 46 How. Pr., 498; affirming 35 N. Y. Superior Ct. (3 Jones & S.), 394.

- 2. As a general rule, a court of equity will only interfere to correct a mistake in a written instrument, where it has been mutual, and does not embody the terms, as fully understood by both parties. But this rule does not prevail, either where the party against whom the relief is sought has acted in bad faith or disingenuously, with full apprehension that the instrument did not express what the other party desired or intended, or where confidence was reposed in him, and he was intrusted with and assumed the preparation of the instrument, but has, in its preparation, either willfully or negligently, omitted what had been clearly stated to him as the intention of the other party, who, relying on its correctness, and without particular examination of the document so prepared, incautiously assents to it, under the supposition that it conforms to the verbal terms of the negotiation, as previously agreed upon. N. Y. Com. Pl., 1872, Brioso v. Pacific Mutual Ins. Co., 4 Daly, 246.
- 3. Equity may reform a deed upon parol evidence of a mutual mistake in regard to the boundaries of the land conveyed, even though the contents of the deed were known to the plaintiff when executed. [10 N. Y., 319.] 1873, Bush v. Hicks, 2 Supreme Ct. (T. & C.), 356.
- Ignorance of foreign law; when deemed a mistake of fact. See Carpentier v. Minturn, 65 Barb., 293.
- Ignorance of fact not equivalent to mistake of fact. Ct. of App., 1873, National Life Ins. Co. v. Minch, 53 N. Y., 144; reversing 6 Lans., 100.
- Grounds of relief in equity. Earl Beauchamp v. Winn, 6 Eng. R. (Moak's Ed.), 37.

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A purchaser of land at an execution sale, which is void by reason of the judgment being void, may, if he paid in good faith without actual knowledge, recover back the money, if those to whom it was paid procures the sale and knew that it would confer no title [2 Burr., 1009]. Ct. of App., 1873, Schwinger v. Hickok, 53 N. Y., 480.

MOTIONS AND ORDERS.

MORTGAGE.

- 1. Where the same land was bound by a judgment and a mortgage, and the mortgage was foreclosed without making the judgment creditor a party,—Held, that the purchaser under the foreclosure acquired the equity of redemption, subject to the lien of the judgment, and that the judgment creditor was not entitled to redeem from the mortgage, but could sell the equity upon execution. Ct. of App., 1873, Reynolds v. Park, 53 N. Y., 37.
- 2. A mortgagee in possession, and having received rents and profits to amount sufficient to satisfy the mortgage, is not thereby divested of his character as a mortgagee in possession, so that ejectment will lie against him; but an action for an accounting must be brought to have the amount ascertained and applied. Ct. of App., 1873, Hubbell v. Moulson, 53 N. Y., 225.

DEBTOR AND CREDITOR, 1; PLEADING, 16; RECORD; TRUSTS (AND TRUSTEES), 2.

MOTIONS AND ORDERS.

- 1. Notwithstanding the restrictions as to the counties in which motions may be made at special term, counsel may agree to have a motion in any cause in the supreme court, heard and decided at a special term, in any county; and the order so made is reviewable as if made in a county prescribed by law. Supreme Ct., 1873, Rice v. Ehle, 65 Barb., 185; S. C., 46 How. Pr., 153.
- 2. Where a motion is granted conditionally upon the failure of the opposing party to do a certain act, if the act is not performed, the proper practice is for the moving party to show, by affidavit, such failure to perform, and thereupon to apply ex parte for an order granting the motion absolutely. N. Y. Com. Pl., 1873, Stewart v. Berge, 4 Daly, 477.
- 3. On an appeal from a judgment of a district court, and pending a stay of proceedings thereon, an order was made, on motion of the respondent, that the appeal should be dismissed unless the return was filed within a specified time. The return was not filed within such time, and the respondent, upon filing an affidavit to that effect, issued execution on the judgment. Held, that this was irregular, and that the appeal was not dismissed without the entry of an order to that effect. 1b.
- 4. An order of court directed the payment out of a certain fund, of any arrearages due or owing to the laborers and employees of a railroad company, for labor and services actually done in connection with such company's railways. Held, that the word "employee" was limited in its operation to such servants of the company as

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were usually engaged in the construction, operation and maintenance of the company's railways [24 N. Y., 482; 38 Barb., 390], and had no application to one employed as legal counsel for the company. 1873, Gurney v. Atlantic & Great Western R. R. Co., 2 Supreme Ct. (T. & C.), 446.

- 5. After entry of an order of the court, an order made by the judge peremptorily requiring the attorneys to appear for the purpose of resettling the order, and the hearing of an argument as to the resettlement, have the effect to reopen the order; and if the judge refuses to modify it, it must be re-entered formally in order to limit the time for appealing. 1872, Star Fire Ins. Co. v. Godet, 34 N. Y. Superior Ct. (2 Jones & S.), 359.
- Repeated refusals to make affidavit until after consulting with counsel, is a sufficient refusal to sustain an order for examination. Rogers v. Durant, 2 Supreme Ct. (T. & C.), 676.
- An interlocutory order—e. g., for payment of temporary alimony
 —is not operative after judgment. Supreme Ct., 1872, Wood v.
 Wood, 7 Lans., 204.
- Subdivision 8 of section 401 of the Code, requiring motions to decided in twenty days, is simply directory. 1872, Hupfel v. Schoemig, 34 N. Y. Superior Ct. (2 Jones & S.), 476.

MUNICIPAL CORPORATIONS.

- 1. In proceedings to acquire lands for public use under a statute allowing this to be done in invitum on making compensation,—an adjudication of the necessity or propriety of taking certain lands determines the right of the respective parties (subject to the further proceedings to fix the compensation), and after such adjudication the applicants can not discontinue, nor should the court permit them to discontinue without the consent of the land owners. Matter of Washington Park, Ante, 148.
- 3. The relators agreed with the commissioner of public works of the city of New York, that the latter might enter on their property, and connect a lake thereon, with the aqueduct of the city, on condition that the commissioner should apply to the legislature for the passage of an act authorizing the purchase of the lake, &c., or the taking of the same by process of law for just compensation; and pursuant to this agreement, the commissioner entered and used the waters, and the legislature passed an act for the purpose contemplated, and the city, for a considerable period, enjoyed the use of the water; but the commissioner and his successor failed to agree with the relator on a price, or to take proceedings to acquire the property; and the city finally ceased to make use of the waters.

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- Held, 1. That these facts did not constitute the relation of vendor and purchaser between the relator and the city. 2. Such a contract by the commissioner, if one had been made, would not bind the successor of the commissioner nor the city, without a ratification. 3. The agreement and the statute passed consequently, and the mere commencement of proceedings to take the relator's property, would not, at least until a report of commissioners thereon, confer any vested right on the relator. People ex rel. Mahopac Manufacturing Co. v. Van Nort, Ante, 242.
- Non-residents owning lands in the town, which are not properly taxed, can not become petitioners to bond said town under Laws of 1871, ch. 925. 1873, People v. Oliver, 1 Supreme Ct. (T. & C.), 570.
- 4. The statute relating to the assessment of non-resident lands must be substantially complied with, or the assessment will be void. [Hill & Denio, 140.] Ib.
- 5. The proceedings to bond a town in aid of a railroad under Laws of 1866, ch., 398, § 2, are in derogation of common law and must be strictly pursued. [45 N. Y., 781.] 1873, People ex rel. Town of Rochester n. Deyoe, 2 Supreme Ct. (T. & C.), 142.
- 6. Where the proof of the consent of a corporation owning more than the amount of property claimed to be in favor of bonding is defective, the proceedings are invalid. 1b.
- It seems, that the act of the clerk in determining whether the requisite consents have been given, is judicial; and he must receive evidence offered. Ib.
- 8. A petitioning taxpayer may withdraw his name at any time before final submission of the case to the county judge. Ct. of App., 1373, People ex rel. Irwin v. Sawyer, 52 N. Y., 296; People ex rel. Yawger v. Allen, 52 N. Y., 538; Supreme Ct., 1873, People ex rel. Angel v. Hatch, 1 Supreme Ct. (T. & C.), 113; S. C., 65 Barb., 430.
- 9. The affidavit of a taxpayer is, under the statute, conclusive evidence that the petition is signed by the number requisite to give jurisdiction. People ex rel Angel v. Hatch (above).
- 10. In proceedings to bond a town it is error to reject on general objection, an offer to have certain petitioners appear and withdraw their names, and the objection that such petitioners were not actually produced, could not be taken for the first time on review. Supreme Ct., 1873, People ex rel. Youmans v. Wagner, 7 Lans., 467.
- 11. The act of assessors in making affidavit that a majority of tax-payers had consented to issue municipal bonds in aid of a railroad, is under the local act, Laws of 1869, ch., 314, § 2, relative to the town of Springport, as under the general law [43 N. Y., 457], in the nature of a judgment which may be reviewed by certiorari. Ct. of App., 1873, People ex rel. Yawger v. Allen, 52 N. Y., 538.

NEW TRIAL.

- 12. The board of commissioners of Washington park was authorized by statute [Laws of 1872, ch. 45] to acquire lands for a public park under the provisions of the general railroad law, and from the time commissioners for appraisal of damages are appointed, are regulated by the laws that govern railroad companies [52 N. Y., 137], and they have the right to discontinue at any time before the report is confirmed. 1874, Washington Park v. Barnes, 2 Supreme Ct. (T. & C.), 637.
- Compensation for buildings and material thereof. Shuchardt v. Mayor, &c. of New York, 53 N. Y., 202; affirming 59 Barb., 295; 62 Id., 671.
- Reduction of assessments in Brooklyn: Matter of Leeds, 53 N.Y., 400.
- 15. When owner, not a party to the proceedings for an assessment, is not prohibited from impeaching the assessment. Matter of Astor, 53 N. Y., 617.

COMPLAINT, 13; PARTIES, 13;

NEGLIGENCE.

- It is negligence to leave a dangerous machine in motion, unguarded, in such an exposure, that children playing near might be expected to be drawn to it by curiosity, and injured. Mullaney v. Spence, Ante, 319.
- DAMAGES, 4; EVIDENCE, 35-40; NONSUIT, 2; PLEADING, 22; QUESTIONS OF LAW AND FACT, 3.

NEW TRIAL.

- 1. In equity actions new trials will not be granted unless it very clearly appears that undoubted injury has been done by the admission of objectionable testimony. The court will look at the entire case, and if substantial justice has been done, will affirm the decision not-withstanding the admission of testimony which, in ordinary actions at law, might have necessitated a new trial. 1873, Platt v. Platt, 2 Supreme Ct. (T. & C.), 25.
- Where it appears that the fact in question was abundantly established by other competent evidence, the admission of incompetent evidence will be disregarded on appeal. 1873, Boyne v. Newcomb, 1 Supreme Ct. (T. & C.), 251.
- 3. Under section 268 of the Code, as amended in 1867, if, on the trial of an equity action, the judge refuses specific relief, and allows an issue or a reference to ascertain the damages, and directs the cause to stand over meanwhile, the decision can immediately be reviewed by moving on a case, at general term, for a new trial.

NEW TRIAL.

- 1873, Stanton v. Miller, 1 Supreme Ct. (T. & C.), 23; S. C., 65 Barb., 58.
- 4. Where the verdict is rendered on incompetent testimony, and there is a well-founded reason to believe that justice has not been done, the judgment will be reversed, even though there was no exception taken on the trial which would on appeal present the question of the incompetency of the evidence. N. Y. Com. Pl., 1871, Maier v. Homan, 4 Daly, 168.
- 5. So also for misdirection of the court although no exception was taken, a verdict may be set aside. Costello v. Syracuse R. R. Co., 65 Barb., 92, 105; following Bennett v. Johnson, 2 Lans., 94.
 - 6. The admission of irrelevant evidence tending to establish the issue, in absence of proof that it had no weight upon the mind of the referee, is sufficient ground to reverse a judgment. 1873, Stearns v. Ingraham, 1 Supreme Ct. (T. & C.), 218.
 - 7. The general rule applied in penal actions and in actions for defamation, that a verdict for defendant will not be set aside as against evidence if plaintiff has sustained only nominal damages, should be applied in actions for assault and battery, especially where plaintiff was not wholly blameless, and has not been grossly injured or insulted. Chase v. Bassett, Ante, 293.
 - Where the trial is before a judge or referee, error in receiving evidence may be deemed cured by its being subsequently stricken out [Questioning Erben v. Lorillard, 19 N. Y., 299]. Supreme Ct., 1873, Garfield v. Kirk, 65 Barb., 464.
 - Where a new trial is granted, because a verdict was against the clear weight of testimony, it is granted only on payment of costs. Supreme Ct., 1873, Murphy v. Haswell, 65 Barb., 380.
 - 10. A verdict in favor of two plaintiffs, when the cause of action was wholly in one, is not ground for a new trial, but the court at general term may correct the judgment by dismissing the action as to the co-plaintiff: Ct. of App., 1873, Simar v. Canaday, 53 N. Y., 298.
 - 11. Under Laws of 1855, p. 613, ch. 337, § 3,—in relation to new trials on error to the court of general sessions of New York,—the court of appeals will not grant a new trial, because the court below rejected testimony offered by the prisoner after the case had been summed up. Ct. of App., 1873, Wilke v. People, 53 N. Y., 525.
 - 12. Section 3 of that act is applicable only to a conviction for a capital offense, or an offense punishable as a minimum punishment by imprisonment in a state prison for life. Ib.
 - Application for new trial on newly discovered evidence denied on the ground of its immateriality and cumulative character. 1872,

NEW YORK.

Ritter v. Phillips, 34 N. Y. Superior Ct. (2 Jones & S.), 289; affirmed on the merits, in 53 N. Y., 586.

- 14. The rule that the verdict of a jury will be set aside for passion, prejudice, inattention to duty, or misapprehension of fact [29 How., 155-170; 49 N. Y., 211],—illustrated. 1873, Burlew v. Hubbell, 1 Supreme Ct. (T. & C.), 235.
- 15. A verdict should not be set aside on the ground that one of the the jurors was disqualified by consanguinity to a party, unless it be shown that injustice has been done. Hayes v. Thompson, Ante, 220.
- The rules governing applications for new trials recapitulated.
 Wehrum v. Kuhn, 34 N. Y. Superior Ct. (2 Jones & S.), 336.
- 17. The words "costs to abide the event" mean the event of the point in controversy on which the new trial was granted. Jones v. Williams, 5 Engl. R. (Moak's ed.), 234, L. R., 8 Q. B., 280.

APPEAL, 36, 37, 40; COSTS, 30, 34, 35; COURT OF APPEALS, 3 ERROR, 4.

NEW YORK.

- 1. The rule that a person who has a claim against the city of New York which is unpaid, in the absence of any statute expressly to the contrary; must seek his remedy by action, unless the account is audited, and allowed, and approved in manner provided by law [17 N. Y., 584; 18 Abb., 100],—reiterated. 1873, People ex rel. Navarro v. Green, 2 Supreme Ct. (T. & C.), 62.
- 2. The audit and allowance of the board of supervisors is conclusive of the right of a person having a claim against the county of New York to recover his claim, subject only to the examination and allowance of his couchers by the auditor, and the approval of the comptroller thereupon, and to the power of the court to intervene by due process in case of fraud or collusion shown [12 Abb., 192]. 1873, People ex rel. Brown v. Green, 2 Supreme Ct. (T. & C.), 18; S. C., as Brown v. Green, 46 How. Pr., 302.
- 3. And a mandamus against the comptroller to pay the claim will not lie without such audit of the vouchers. Ib.
- 4. An auditing by the audit bureau under Laws of 1870, ch. 137, § 37, was not conclusive, and did not dispense with the necessity of submitting the claim to the board of apportionment and audit formed under Laws of 1872, chs. 9, 375. Ct. of App.. 1873, People ex rel. Brown v. Board of Apportionment, 52 N. Y., 224; and see 2 Supreme Ct. (T. & C.), 18, 23.
- Mandamus allowed to require auditor to audit and comptroller to
 pay balance of a just county charge, which had been audited by the
 supervisors. People ex rel. Hawley v. Earle, 46 How. Pr., 267.
 P., People ex rel. Duffin v. Earle, Id., 308.

NONSUIT.

- But if there has been no appropriation, he can only have a mandamus to audit, not to pay. People ex rel. Miller v. Green, 46 How. Pr., 367.
- Regularity of assessment, and failure to publish notice. Matter of Astor, 2 Supreme Ct. (T. & C.), 488.
- 8. Under Laws of 1872, ch. 580, amending Laws of 1858, as to the mode of setting aside assessments in New York and Brooklyn for fraud or irregularity, the preceding is applicable only to the lands described and belonging to the party aggrieved, the applicant. Ct. of App., 1873, Matter of Delancey, 52 N. Y., 80.
- Publication of resolution for local improvement essential even though no paper had been designated pursuant to law in which to make publication. Ct. of App., 1873, Matter of Smith, 52 N. Y., 526; reversing 65 Barb., 283; compare Matter of Folsom, 2 Supreme Ct., (T. & C.), 55.
- The court can not review discretion of croton aqueduct board in laying out sewage districts. Matter of Ellsworth, 53 N. Y., 647.
- 11. The corporation of the city of New York, since its ownership of the streets is in trust for benefit of the general public, has no power to sanction the erection, for private purposes, of awnings upon the sidewalks, which obstruct the public use of the way. Trenor v. Jackson, Ante, 115.
- 12. The term of office of police justice in city of New York is not vested by the constitution, but is subject to legislative control. Coulter v. Murray, Ante, 129.

NONSUIT.

- 1. The rule that in considering the propriety of a nonsuit granted at the trial, plaintiff is entitled to the concession that the facts existed as they appear in the evidence on his part, and that upon these facts, aided by any fact favorable to plaintiff, proved by defendant, the right of the court to nonsuit is to be determined,—applied. Carl v. Ayres, 53 N. Y., 14.
- 2. Defendant had in his coal-yard an elevator worked by steam, close to the line of the sidewalk; and during the intermission of work, the sliding door by which it was commonly shut off from the street, was left open; and in absence of any person to guard it, a child, who approached it, was caught and crushed by the descending car. Held, in the administrator's action to recover damages, that it was improper to grant a nonsuit on these facts; and that the question of defendant's negligence should be submitted to the jury. Mullaney v. Spence, Ante, 319.

TRIALS, 28-32.

NUISANCE.

NOTICE.

- 1. Where time is not of the essence of a contract, in order to forfeit the rights of one of the parties thereunder, notice must be given him by the other, requiring performance within some reasonable time therein specified, and that, in case of default, his rights will be deemed abandoned. Ct. of App., 1873, Myers v. De Mier, 52 N. Y., 647; affirming 4 Daly, 347.
- 2. A purchaser who consented to leave the property in the grantor's possession, stipulating that it should remain there for the period of sixty days,—Held, to be put on notice; and therefore, having purchased without inquiry, he took subject to equities. Goodenough v. Spencer, Ante, 248.
- 3. A bank having once made a loan to A. on a note, and the loan having been paid and the note returned, B., who meanwhile had become owner of the note, went with A. to the bank and asked for a second loan thereon to A. in a limited amount. Held, that this request was not equivalent to notice that B. was owner of the note, and the bank could hold the note for further advances made on the faith of it to A. Voorhees v. National Citizens' Bank, Ante, 13.
- Where a party was heard, notice of the assessment may be presumed. Odell v. De Witt, 53 N. Y., 643.
- 5. A proceeding to set aside a sale under the foreclosure of a mortgage, is of an equitable nature, and a notice which is fairly sufficient to put a person on inquiry is enough to create the obligation of diligence [Story's Eq. Jur., §§ 400, 401; Parsons on Cont., vol. 2, 671; 23 Wend., 18; 15 N. Y., 534]. Accordingly, when more than two years have elapsed since plaintiff had notice of facts sufficient to put him on inquiry, a motion to set aside a sale under foreclosure will be refused. 1874, Depew v. Dewey, 2 Supreme Ct. (T. & C.), 515; S. C., 46 How. Pr., 41.

NUISANCE.

- Any person who sustains a private injury from the erection or continuance of a public nuisance, may maintain an action therefor.
 Trenor v. Jackson, Ante, 115.
- A structure which, though not hurtful to health or noxious to the senses, interferes with the comfortable enjoyment of life or property, is a nuisance within this rule. 1b.
- 3. Remedy in case of noxious business, or business so carried on as to be noxious. 6 Eng. R. (Moak's ed.), 440, n.

INJUNCTION, 3, 4; PARTIES, 41.

OFFICER.

- A grant of power, in the nature of a public office, to several, does not become void upon the death or disability of one or more; all are deemed to meet when all who are living and qualified to act, come together. Ct. of App., 1873, People ex rel. Kingsland v. Palmer, 52 N. Y., 83.
- Statutes fixing the time for public officers to file official bonds are directory. McRoberts v. Winant, Ante, 210.
- A county treasurer may file his bond at any time before entering upon duties of his office. Ib.
- Official oath, and effect of neglect to take it. People ex. rel. Williamson v. McKinney, 52 N. Y., 374.

PAPERS AND SCHEDULES.

A simple reference, in a paper or petition, to a schedule annexed, is sufficient to incorporate the schedule in legal effect, without more particular description; and any language which clearly indicates the intent to that effect, suffices. It is immaterial whether the connection is shown by a reference in the body of one to the other, or by a physical annexing of them in a manner or under circumstances showing clearly the intent that the two shall together make one instrument. Thus, in a petition to condemn lands for a local improvement, a reference to names and residences of land owners "hereafter stated" sufficiently incorporates with the petition a schedule of names and residences physically annexed thereto. Ct. of App., 1873, Matter of Comm'rs. of Washington Park, Albany, 52 N. Y., 131.

PARENT AND CHILD.

- 1. Where the parents of the child lived in a quiet neighborhood in the city, where few vehicles passed, and the mother permitted the child to play upon her steps with other boys, watching him meanwhile as her work permitted,—Held, that the question of her negligence, in not keeping him away from a dangerous machine, should have been submitted to the jury. Mullaney c. Spence, Ante, 319.
- Rights and remedies of father and mother respectively. 6 Eng. R. (Moak's ed.), 553, n.

PARTIES.

 In an action to compel an accounting, all persons interested in obtaining an accounting must be made parties. Supreme Ct., 1872, Petrie v. Petrie, 7 Lans., 90.

- In an action to compel an executor to account, legatees whose legacies have been paid and who have given agreements to refund, are still interested in the estate, and entitled to be heard on the accounting. Ib.
- 3. In an action for an accounting by a trustee, the personal representatives of a deceased trustee are necessary parties, unless it is conceded that no part of the estate came into his hands. Even then, the protection of his estate would seem to require that they be made parties. Ib.
- Where there are no representatives, they should be appointed and made parties. 1b.
- Persons entitled under the will to money from the estate for their education, are necessary parties to the accounting of the executor. Ib.
- 6. A legatee under a will can not maintain an action to recover assets from the representatives of a deceased executor. Such an action can only be maintained by the testator's personal representatives. Nor can the legatee maintain an action to restrain a solvent, surviving executor from applying funds of the estate to payment of fictitious or outlawed debts, or committing any other breach of trust. Ib.
- 7. The legatee must know that the executor is insolvent, before he can require the court to assume control of his acts. *Ib*.
- Upon the death of a copartner his representatives are entitled to an accounting of the copartnership as of the time of his death [Story on Part., § 343]. 1873, Cheeseman v. Wiggins, 1 Supreme Ct. (T. & C.), 595.
- 9. If the business is continued it is solely at the risk of the survivor, and the representatives of the deceased partner may go into equity to compel an account [Story on Part., § 347], and this whether there is anything due such representative or not. Ib.
- 10. The heirs are not necessary parties on such accounting. Ib.
- 11. To bind the estate of a deceased party, or to authorize any decree for an account against the same, the party who is the representative must be made a party distinctly in his representative capacity. 1873, Fisher v. Hubbell, 7 Lans., 481; S. C., 1 Supreme Ct., (T. & C.), 97; 65 Barb., 74.
- 12. A number of persons associated for a large speculation in stocks, and designated four managers to buy and sell for them. Held, that in an action by one associate, alleging breach of agreement on the part of the managers, and that they had misrepresented the result on the day of settlement, and had not properly accounted, showed a right to an account from the managers alone, and that as it did not appear that the other associates elected to have a new account,

they were not proper parties 'defendant. 1873, Boody v. Drew, 2 Supreme Ct. (T. & C.), 69.

- 13. The assignee of a claim, payment of which is refused by the debtor on the ground that it had been paid, in his transactions with the assignors, to which transactions the assignee was a stranger, can not maintain an action joining the debtor and the assignors as defendants, and seeking an accounting to ascertain the rights and liabilities of the parties, and to have judgment against the one who may be found liable. His remedy must be either against the original debtor upon the claim assigned, or against the assignors for a breach of warranty. Camblos v. Butterfield, Ante, 197.
- 14. All the holders of municipal stock or bonds of an illegal issue may be joined as defendants in one action, and the validity of the stock held by them severally determined. [34 N. Y., 30.] 1873, Town of Venice v. Breed, 1 Supreme Ct. (T. & C.), 130; S. C., 65 Barb., 597.
- And a court of equity has power to compel a cancellation and surrender of such bonds [Story Eq. Jur., §§ 692, 700; 6 Duer 597;
 Johns. Ch., 517; 13 How Pr., 132.] Ib.
- 16. On a joint and several bond, an action lies against any one or more of the obligors, at the option of plaintiff. Field v. Van Colt, Ante, 349.
- 17. If the complaint alleges a joint obligation, it may be amended, after proof of a joint and several obligation, so as to sustain the judgment against more than one, and less than the whole number. Ib.
- 17. The complaint on an administration bond need not allege the grounds of the surrogate's decree, for disobedience of which suit is brought. Ib.
- 18. An action at law can not be maintained against the executor of one of several joint makers of a promissory note, without joining the surviving makers, and alleging that they were insolvent, or that plaintiff had exhausted his remedies against them, or had taken steps, or made some effort to collect his demand from such survivors, or either of them [17 N. Y, 354; 42 Id., 373; 49 Id., 385]. Alleging insolvency at the time of making the contract is not enough. 1873, Bentz v. Thurber, 1 Supreme Ct. (T. & C.), 645.
- 19. Where an instrument is in form payable to the obligees jointly, but the interest is several, one may sue alone [1 Chit. on Pl., 11]. a promise to pay plaintiff may be taken into consideration in determining whether her interest is joint or several. 1873, Hees v. Nellis, 1 Supreme Ct. (T. & C.), 118; S. C., 65 Barb., 441.
- 20. Where a stranger contracts for services or repairs in respect to the property of a third person,—in this case a husband employing a plumber on the house owned by his wife,—he may maintain an action to recover damages for a breach of the contract. 1872,

- Quackenbos v. Edgar, 34 N. Y. Superior Ct. (2 Jones & S.), 333.
- 21. Actions growing out of the contracts of a firm must, upon the death of a partner, be brought by or against the surviving members alone. Carrere v. Spofford, Ante, 47.
- 22. The joint debt may, by reason of the death of a partner, be treated as if originally a separate debt of the surviving partner. Ib.
- 23. The defendants, a firm, by a written agreement, contracted to employ plaintiff as a clerk for five years, the latter agreeing to act for them and their successors and assigns under their direction and control. Before the expiration of the five years defendants' firm dissolved, and was succeeded in business by a new firm, with which plaintiff continued in service. Held, that in a suit upon the contract for wages earned after the dissolution, and while plaintiff was in service of the new firm, it was not necessary to join as parties defendant the members of the new firm, who were not parties to the written agreement. N. Y. Com. Pl., 1871, Smith v. Douglass, 4 Daly, 191.
- 24. Legatees claiming an equitable conversion of real estate under the will of another decedent in favor of their testator, or a charge of their legacies, by their testator, upon land devised to him by such will, the personal representatives of each estate being the same, may bring an action for construction of the wills, an accounting, and payment of their legacies, and may join in one suit as creditors having claims of equal degree and under like circumstances [Barb. on Pr., 385; Story Eq. Jur., §§ 532-538; 1 Edw. Ch. 451]. Supreme Ct., 1873, Fisher v. Hubbell, 7 Lans., 481; S. C., 1 Supreme Ct. (T. & C.), 97; 65 Barb., 74.
- 25. The rule that when a trust arises under a will, or would arise if it be void, any person interested in the trust may apply to the court for a construction of the will, and directions as to the trust [10 Paige, 194; 24 How. Pr., 353; 34 Barb., 113],—reiterated. 1873, Kiah v. Grenier, 1 Supreme Ct. (T. & C.), 388.
- 26. Possessory title in the State, of drafts of county treasurers sent to the State treasury in payment of taxes, is sufficient to maintain an action for conversion against a mere wrong doer without title [1 Tur. & Gran., 150; 1 Exch., 70; 5 Ellis & Blackb., 802]. 1874, People v. Sherwin, 2 Supreme Ct. (T. & C.), 528.
- 27. Whether husband and wife can or can not be partners with each other, they may be so jointly interested in property,—e. g., where the furniture of a boarding-house which they jointly kept was purchased with money contributed by both,—that they may sue jointly for a conversion thereof. 1873, Chambovet v. Cagney, 35 N. Y. Superior Ct. (3 Jones & S.), 474.

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- 28. The equitable right of a married woman, under a trust created by another person, by which income is to be applied to her use for life, since it is not assignable, is not to be deemed her separate property; and her husband is, therefore, a proper party to an action affecting the same. Bloodgood v. Mickle, Ante, 103.
- 29. The provision of Laws of 1860,—that a married woman may sue and be sued in all matters relating to her sole and separate property without joining her husband,—does not apply to an action affecting a mere equitable right under a trust, which is not capable of assignment. Ib.
- 30. Guardians of the property of an infant are necessary parties in an action affecting the property; and a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action against them, can not be sustained merely because no recovery could be had in the action against the personal estate of the infants. If any cause of action calling for any relief whatever as to which the guardian should be heard, appears in the complaint, the demurrer must be overruled. Ib.
- 31. A testamentary trustee, with the approval of the general guardians of minors interested in the trust property, made a contract for the erection of a building thereon. Held, that the guardians were proper parties to the contractor's action to recover his compensation on the contract; and that the trustee having died, his administratrix was also a proper party, because, if the contract should prove to have been unauthorized, the plaintiff would be entitled to recover against the administratrix in enforcement of the trustee's individual liability. Ib.
- 32. Under peculiar circumstances,—e. g., as in case of collusion between debtor and personal representatives, &c.,—a creditor of an estate of a a deceased person may maintain an action to collect his debt from a debtor to the estate. The same rule applies where the executor of the estate primarily liable, is administrator with the will annexed of an estate indebted to it. Supreme Ct., 1873, Fisher v. Hubbell, 7 Lns., 484; S. C., 1 Supreme Ct. (T. & C.), 97; 65 Barb., 74.
- 33. Corporations may invoke the aid of the court to relieve from their illegal contracts in the same manner as individuals. Supreme Ct., 1872, President of Union Bridge Co. v. Troy & Lansingburg R. R. Co., 7 Lans., 240.
- 34. An action does not lie to restrain a corporation from paying moneys pursuant to its own illegal or unauthorized covenant, unless the covenantees, or some person representing them, are parties [7 Cranch., 69, 98; 12 Wheat., 194; 3 Paige, 15; 4 Com., 460]. And it is no excuse for the omission of such parties that they are foreign cor-

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porations, and beyond the jurisdiction. Supreme Ct., Sp. T.. 1873, Dinsmore v. Atlantic & Pacific R. R. Co., 46 How. Pr., 193.

35. Laws of 1865, ch., 368, authorizing a corporation formed under it to sue and be sued, is subject to the qualification that it must be in relation to some matter within the scope of the statute, and the legitimate purpose of the organization. Supreme Ct., 1873, Ancient City Sportsman's Club v. Miller, 7 Lans., 412.

36. Where one induced by fraud to exchange his property for worth-less securities, gives the securities to another, the cause of action for deceit is wholly in the former and not in the latter. The fact that a favor done is not fruitful of profit by reason of the wrongful act of a third person preventing, does not give the done the right of action against the wrongdoer. Ct. of App., 1873, Simar v. Canaday, 53 N. Y., 298.

37. An assignee for benefit of creditors takes the title of his assignor subject to rights of judgment creditors [51 N. Y., 552; 19 N. Y., 375], and the latter may bring an action to set aside a fraudulent conveyance made by the assignor of the former. 1874, Taft v. Wright, 2 Supreme Ct. (T. & C.), 614.

38. A resident citizen and taxpayer, and owner of land on the streets in the vicinity of a park, but not the owner of land fronting on the park, has not, as such, a standing in a court of equity entitling him to maintain an action to enjoin the city authorities from selling the park. Supreme Ct., 1873, Tifft v. City of Buffalo, 65 Barb., 460; S. C., 1 Supreme Ct. (T. & C.), 150.

39. A man may recover for loss of his baggage notwithstanding part of it was his wife's apparel. Absolute title is not necessary. 1873, Rogers v. Long Island R. R. Co., 1 Supreme Ct., 396.

40. Husband and wife may join in an action for fraud by which the husband was induced to convey, and the wife by the same deed to release her right of dower in, lands of the husband. In this case both plaintiffs have an interest in the subject of the action, whether that be considered to be the property conveyed, or the acts of defendant and the consequent damage; and both have an interest in obtaining the relief demanded. Ct. of App., 1873, Simar v. Canaday, 53 N. Y., 298.

41. The owner of real property may maintain an action because of a nuisance in the neighborhood, notwithstanding the same nuisance affects in the same way a large number of houses. It is no defense to a wrongdoer, when called upon to compensate the damages he has caused, to show by the same act he inflicted a like injury upon numerous other persons. The distinction is that those who have sustained damage peculiar to themselves may each maintain an action, no matter how numerous they may be. It is only when the.

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injury is common to the public, and special to no individuals that redress must be sought by indictment [7 Cow., 609; 4 Wend., 9; 27 N. Y., 611; 9 Eng. L. & E., 104]. Ct. of App., 1873, Francis v. Schoellkopf, 53 N. Y., 152.

- 42. The wife of a tenant in common need not join as plaintiff with him in an action to partition his real estate. She is a necessary party, but more fittingly defendant than plaintiff. An objection that she is made defendant, and not a coplaintiff with her husband, can not avail other defendants in the action. Supreme Ct., 1873, Rosekrans v. White, 7 Lans., 486.
- 43. The nominal assignee of a judgment, by an assignment v hich was intended to operate merely as a power of attorney, who, acting as agent, under the assignment, sells the debtor's land and procures a sheriff's deed, is not entitled to maintain an action to redeem from a foreclosure, for he is not the real party in interest. 1872, McKee v. Murphy, 34 Superior Ct. (2 Jones & S.), 261.
- 44. A passenger in a railroad car, who finds property there, is entitled to hold possession, as against others than the owner, and to maintain an action to protect that right. Where he gave the property to the conductor with a request to inquire for the loser, and if not found to report to him on the return trip, and the company, who received the property from the conductor and did not find the owner, refused to return it to the finder,—Held, that the finder could maintain an action against the company therefor. 1873, N. Y. & Harlem R. R. Co. v. Haws, 35 N. Y. Superior Ct. (3 Jones & S.), 372.
- 45. A minor, who has a guardian in socage, has no right of action to recover possession of his lands, or the rents and profits thereof. The guardian alone can sue [1 R. S., 718, §§ 5-6; McPherson on Infancy, 28, 35; 17 Wend., 75, 78; 19 Id., 306]. 1873, Seaton v. Davis, 1 Supreme Ct. (T. & C.), 91.
- 46. But the objection must be taken by demurrer, or it will be deemed to be waived. Ib.
- 47. In an action in the nature of a scire facias to revive a judgment against a deceased debtor, the administrator and the heir at law of such debtor can not be joined as parties defendant [Code, § 167]. 1873, Strong v. Lee, 2 Supreme Ct. (T. & C.), 441; affirming 44 How. Pr., 60.
- 48. The proper proceeding in such a case is that provided by the Code, § 376, 1b,
- 49. In an action for the benefit of plaintiff and other taxpayers of his town, to recover a tax alleged to have been unlawfully collected, and to restrain its disbursement by injunction, none of the other taxpayers appearing to have joined in the action, must be treated

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as the personal action of plaintiff, nor could such action be maintained on behalf of the other taxpayers, on the ground of avoiding multiplicity of suits, it not appearing by the complaint or evidence that any other taxpayer dissented from payment of the tax. Hence a judgment for repayment to such taxpayers can not be sustained, as they neither applied for such relief, and plaintiff had not the authority to make the application in their behalf. Supreme Ct., 1873, Kilbourne v. Allyn, 7 Lanz., 352.

- 50. One who sows or plants lands on shares may maintain an action of trespass quare clausum fregit against a stranger who enters and treads down the corn [1 Chitty Pl., 201]. 1873, Stevens v. Adams, 1 Sugreme Ct. (T. & C.), 587.
- 51. The provision of section 113 of the Code, that the trustees of an express trust may sue without joining the beneficiaries, is permissive only and does not forbid an action by the beneficiaries, with or without the trustees. Ct. of App., 1873, Hubbell v. Medbury, 53 N. Y., 98.
- 52. The general rule of equity, that in cases of breach of trust, where no other general rule or order of the court interferes, and where the facts call for a contribution or a recovery over, all persons who should be before the court to enable it to make a complete and final judgment, are necessary parties, is not abrogated by the Code. Ct. of App., 1873, Sherman v. Parish, 53 N. Y., 483.
- 53. The cestui que trust under an assignment for the benefit of creditors, and the assignor, may maintain an action to set aside a wrongful purchase of the trust property by the trustee. A substituted trustee is not a necessary party. Ct. of App., 1873, Hubbell v. Medbury, 53 N. Y., 98.
- 54. It seems, that one who acquires his interest in lands from one of the parties to an action concerning it, is affected by the decision therein as his grantor would have been. Salisbury v. Morss, 7 Lans., 359.

ABATEMENT AND REVIVAL; ACTION, 3; HUSBAND AND WIFE, 2.

PARTITION.

- A trustee holding, and being in possession of lands as tenant in common, and having an absolute power of sale, may bring a suit in partition to divide the estate [2 R. S., 317]. 1873, Galleo v. Eagle, 65 Barb., 583; S. C., less fully, 1 Supreme Ct.; (T. & C.), 124.
- By the common law partition of real property between tenants in common is matter of right where either party will not consent to hold and use the property in common [10 Paige, 470; 2 Barb., 600; 2. R. S., 317]. Ib.

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- Constructive possession of an undivided share or interest in the premises, by plaintiff as tenant in common or joint tenant, is sufficient to maintain an action for partition. Supreme Ct., 1872, Howell v. Mills, 7 Lans., 103.
- 4. Where the tenant for life has actual possession, partition may be maintained between the remainder-men in fee, whose estate is subject to be divested by the death of one without issue. *1 b.
- 5. In proceedings for partition of real property, the court have not power to set off land for the widow's dower to her use for life, and decree that upon her death it shall be sold and the proceeds divided among the heirs according to their interest. There can regularly be but one judgment in these proceedings, and that must settle the rights of all parties; and it is only where the interests of all parties have not been ascertained, or where there are conflicting claims to a share that a partial partition can be ordered. In the case of a dower-right, the court should order a title subject to the right of the doweress to occupy the part set-off during her life. Supreme Ct., 1873, Post v. Post, 65 Barb., 192.
- 6. In proceedings for partition of real estate the commissioners have power to require the payment of money to equalize shares; and the court will not interfere unless it appear that the power has been abused or exercised unjustly. 1b.

Accounting, 1; Action, 11; Appeal, 14; Complaint, 14; Parties, 42.

PARTNERSHIP.

- Creditors of a partnership, knowing that one partner had retired, and that the others had agreed to assume and pay the firm debts, took the negotiable note of the latter in payment of a firm debt. Held, that he thereby discharged the other partner. Millerd v. Thorn, Ante, 371.
- Rights of partners, continuing and retiring, in respect to assets sold on execution, &c. Menagh v. Whitwell, 52 N. Y., 146.

PAYMENT.

- Payment by a savings bank to a person presenting a pass book is good, if the officers have no notice of fraud upon the depositor, and in making such payment exercise reasonable care and diligence. Hayden v. Brooklyn Savings Bank, Ante, 297.
- A debt, the existence and amount of which are not disputed, is not
 extinguished by payment of a less sum, unless a release by deed be
 given. Irvine v. Milbank, Ante, 378.

QUESTIONS OF LAW AND FACT, 8.

PENALTY.

In what cases several penalties may be recovered for repeated offenses. Suydam v. Smith, 52 N. Y., 383.

PERJURY.

General principles stated, and applied to case of witness indicted for false testimony in a civil action. People v. Pearsall, 46 How. Pr., 121.

PETITION.

In what case a petition speaks as of the time of its presentation, rather than as of the time of signing. People ex rel. Erwin v. Sawyer, 52 N. Y., 296.

PAPERS AND SCHEDULES.

PLEADING.

- 1. The pendency of another action, brought by defendants against plaintiffs, in which the present plaintiffs had been allowed their claim as an off-set, must be pleaded, or is not available on the trial [12 N. Y., 17]. 1873, White v. Talmage, 35 N. Y. Superior Ct. (3 Jones & S.), 223.
- 2. In an action to restrain defendants from bringing suits, under a certain agreement made between him and plaintiff's agent, to cancel the agreements sued on, and for an accounting, defendant set up a claim for damages for refusing to carry out such contracts, and demanded affirmative relief. No reply was served, nor was objection made at the trial that it was not. Held, that if a reply were necessary, which was doubtful, the omission to object at the trial was a waiver of the objection [20 N. Y., 58; 42 Barb., 36; 12 N. Y., 18; Id., 81; 44 N. Y., 415]. 1874, Holloway v. Stephens, 2 Supreme Ct, (T. & C.), 562.
- 3. Complaint alleged defendant's acceptances, as matter of inducement, and an accounting thereon and promise to pay balance; defense, statute of limitations; referee found there had been no accounting. Held, that the complaint was not on the drafts, and the demand being stated, leave to amend was denied, and judgment for defendant affirmed. Graham v. Selover, 46 How. Pr., 107; affirming 59 Barb., 313.
- 4. Protest of a domestic note is not necessary, and where the complaint on such a note separately alleges protest, and demand and refusal, an allegation in the answer, denying the protest, does not

- put in issue the question of demand and refusal. N. Y. Com. Pl., 1872, Brennan v. Lowry, 4 Daly, 253.
- In such a case, the rule that protest includes, by implication, a demand and refusal does not apply. 1b.
- 6. In an ordinary action by several plaintiffs, to recover money due on contract made with them, an allegation in the complaint that they were copartners, becomes immaterial, so far as the issue is concerned, if the answer admits the contract; and a denial in the same answer, of the allegation of a partnership, does not entitle plaintiffs to open and close. Millerd v. Thorn, Ante, 371.
- 7. Where the answer, in an action for conversion, sets up that the title of plaintiffs in the property is that of mortgagees only, and that defendant is entitled upon making a payment, to withdraw a proportionate part of the hypothecated property, and that he has made such a payment, for which, in making demand of the goods, plaintiffs have made no allowance;—this is an admission of a valid transfer of an interest in the goods to plaintiffs, and of their right to recover for a proportionate part, as well as of a demand for the goods. N. Y. Com. Pl., 1871, Gomez v. Kamping, 4 Daly, 77.
- 8. Under such pleadings, defendant will not be permitted to show, on the trial, that plaintiffs had no interest in the goods whatever, nor that defendant holds them as a bailee for plaintiffs. Ib
- A count for money had and received "as above stated" is a sufficient reference to a previous count for fraud and deceit, and incorporates the allegations of the first count into the latter, so as to render them counts for money had and received by means of fraud [1 Chitty Pl., 113-385]. 1873, Woodbury v. Delap, 1 Supreme Ct. (T. & C.), 20.
- 10. As the liability grows out of the same transaction as that alleged in the first count. they are properly united [Code, § 161]. Ib.
- 11. Where damages, which, though the natural consequences of an act, are not necessarily the result of it, are sought to be recovered, they must be specially alleged in the complaint. Such allegation of damage is not traversable matter, but must be inserted in the complaint, in order that defendant may be prepared with evidence to rebut proof offered of such damage, or the amount or extent of it. N. Y. Com. Pl., 1872, Baldwin v. N. Y. & H. Navigation Co., 4 Daly, 314.
- 12. If averments of such special damage are not originally inserted in the complaint, the judge may allow it to be done by amendment on the trial, when no injury will result to defendant from it. Ib.
- 13. It will be assumed on appeal that defendant was not injured by allowance of the amendment, where defendant at the trial merely made a general objection, but did not state any particulars in which

he would be injured, such as showing absence of witnesses who might have been procured, &c. Ib.

- The practice recognized and acted upon in Miller v. Garling (12 How. Pr., 203), approved to the extent of the rule above stated. Ib.
- 15. A demurrer is not "a defense," so as to be stricken out as sham; but judgment on it as frivolous may be moved for. N. Y. Superior Ct., Sp. T., 1873, Kain v. Dickel, 46 How. Pr., 208.
- 16. When the defect of parties is apparent upon the face of the complaint, even though the absentees are not named, the remedy is by demurrer [Code, § 144]. It is only when evidence is necessary to make the defect apparent that the objection can be taken by answer [37 N. Y., 371]. 1873, Hees v. Nellis, 1 Supreme Ct. (T. & C.), 118; S. C., 65 Barb., 441.
- 17. If not taken by demurrer, which it should be, the objection is unavailing. 1b.
- 18. In an action to foreclose a mortgage given by a married woman,—

 Held, that a statement in the mortgage pleaded, that the mortgaged premises were occupied by the woman as a dwelling, and the mortgage was intended to cover all the lands and buildings in connection therewith, was, on demurrer, a sufficient allegation that the premises were her separate estate. Moreover, when a married woman gives a mortgage on real estate, the property may be presumed to be her separate property until the contrary appears, and, it seems, she is estopped from denying that it was so. Supreme Ct., 1873, Kidd v. Conway, 65 Barb., 158.
- 19. In foreclosure, an answer alleging the invalidity of the mortgage in suit, and claiming title to the premises under a subsequent mortgage, is not a counter-claim, but simply an equitable defense, and therefore does not call for a reply. Supreme Ct., 1873, Caryl v. Miller, 7 Lans., 416.
- 20. In an action against a foreign corporation the non-residence of the plaintiff is matter in abatement; but is waived by appearing and pleading in bar [6 Hill, 297]. 1873, Root v. Great Western Railway Co. 1 Supreme Ct. (T: & C.), 10.
- 21. Whether in claiming damages for deceit in the sale of land, an allegation that the representations, if true, would have increased its value more than five thousand dollars, and a conclusion with a general allegation of damage to the amount of five thousand dollars, which defendant claims, is an allegation of a material fact admitted by the failure to reply, or whether it is only a general allegation of damages which must be supported by proof,—query? Isham v. Davidson, 52 N. Y., 237.
- 22. In an action on a judgment, defendant will not be permitted to show, under a general denial, that the judgment sued on was, sub-

sequent to its entry, vacated by order of court. The vacatur of the judgment should be specially pleaded, as matter in avoidance. N. Y., Com. Pl., 1871, Carpenter v. Goodwin, 4 Daly, 89.

- 23. Where such an order is put in evidence, under a general denial, in a suit on the judgment, and no application is made to the court at the trial to amend the pleadings, the judgment will, on appeal, be reversed, and the court will refuse to disregard the defect, or to order the amendment to be made nunc pro tunc. Ib.
- In actions for negligence, complaint need not negative contributory negligence of plaintiff. Robinson v. N. Y. Central, &c., R. R. Co., 65 Barb., 146.
- 25. Where service of summons is ordered to be made by publication, effecting service out of the State, before the expiration of the time for publication, does not shorten the time to answer. Kerner v. Leonard, Ante, 96.
- 26. The province of a supplemental complaint is to present such facts material to the case, occurring after the making of the former complaint, as aid the original statement of a cause of action, or tend to vary the relief to which plaintiff is thereby entitled, or which tend to perfect an inchoate right so stated, which has since been made or become complete. N. Y. Com. Pl., 1871, Bostwick v. Menck, 4 Daly, 68; reversing 8 Abb. Pr., N. S., 169.
- 27. Such supplemental matter, however, can, with the original complaint, constitute but one cause of action, and if the cause of action sought to be enforced by the original complaint did not exist or was defective at the time of the commencement of the action, it can not be created, cured, or aided by matters subsequently occurring. The matters subsequently occurring and sought to be introduced by supplemental complaint must be such as do not change the rights or interests of the parties before the court, but must merely refer to and support the same title alleged in the complaint, and already presented to the court. A new substantive cause of action can not be supplied or introduced into the case by supplemental bill. Ib.
- 28. Where a receiver, appointed to supplementary proceedings, brings an action to set aside a conveyance fraudulently made by the judgment-debtor, and subsequent to the commencement of the action, other judgments are recovered against the same party, and he is appointed receiver in supplementary proceedings taken on behalf of other judgment creditors, he can not, by a supplemental complaint, include these claims in the original action. 1b.
- 29. Notwithstanding a bankrupt's discharge, the moral obligation to pay a debt remains, and the original demand may be treated as the cause of action; and if the defendant sets up his discharge the

- plaintiff may, without having pleaded it, prove a new promise. Ct. of App., 1873, Dusenbury v. Hoyt, 53 N. Y., 521; reversing 14 Abb. Pr. N. S., 132.
- 30. Under prayer for general relief, redemption and accounting may be allowed. Waters v. Crawford, 2 Supreme Ct. (T. & C.), 602.
- 31. The relief to be awarded in an equitable action, must be in accordance with the allegations of the pleadings as well as with the proofs. It is not sufficient in such a case to sustain a judgment in favor of plaintiff, for relief that he has not asked for, and on a ground not submitted to the court by his complaint, that it appears from the proofs taken that he may be entitled to it. Anonymous, Ante, 171.
- 32. Under the Code, the right of selecting remedies, and the question whether the action is in tort or on contract, and, therefore, whether causes of action are improperly joined in the complaint, must be determined, as at common law, by the insertion in or omission from the pleadings, of the allegation that defendant undertook and promised. Thus, where the complaint alleged that defendant, for value, assigned a judgment to plaintiff, and that defendant subsequently discharged it of record, thus destroying a lien and rendering the judgment worthless, it is deemed to state a cause of action in tort, if there is no allegation that the defendant undertook or promised not to do so; and hence a cause of action for money received can not be joined in the same complaint. Supreme Ct., 1873, Booth v. Farmers', &c. Bank, 65 Barb., 457; S. C., 1 Supreme Ct. (T. & C.), 45.
- Rules of pleading and proof, in actions for slander. Bassil v. Elmore, 65 Barb., 627; affirmed in 48 N. Y., 561.
- 34. Where a defendant, sued for a wrongful levy, answers justifying under process against a corporation to whom he alleges the property levied on belonged, plaintiff may prove in avoidance, that before the levy the property of the corporation had been vested in a receiver. Chapman v. Douglas, Ante. 421.
- 35. Where defendant justifies under a written instrument, and the plaintiff is not entitled to reply as of course, the existence of the instrument may be deemed fully at issue without a reply; and plaintiff may prove that it contained a clause not agreed to, and that he was induced to sign by fraud, as if the instrument had been declared on, and an answer had denied making it. 1873, Chambovet v. Cagney, 35 N. Y. Superior Ct. (3 Jones & S.), 474.

AMENDMENT; APPEAL, 11, 12, 28: COUNTER-CLAIM, 1; DISCHARGE; EXAMINATION OF PARTY; PAPERS AND SCHEDULES. PRECEDENT.

POOR.

- 1. It is no defense to a complaint that a person is disorderly, in that he refuses to support his wife; that an action for divorce is pending between them, and is now in the court of appeals; and that he has, by order of the court, paid a gross sum for alimony and counsel fees. 1873, People v. Mitchell, 2 Supreme Ct. (T. & C.), 172.
- The supreme court cannot, by order, cast upon the people the burden of supporting the wife of a man able to support her. Ib.

POWERS.

- Power to sell land for payment of creditors, not implied from a mere charge of debts upon the lands. The remedy is a surrogate's order under the statute. Ct. of App., 1873, Matter of Fox, 52 N. Y., 580; affirming 63 Barb., 157.
- Power of attorney to sue, recover, and receive, &c., and to give release of judgments recovered, gives no power to release without payment. De Mets v. Dagron, 53 N. Y., 635.
- 8. Powers of attorney, and all special powers, are to be construed strictly, and the general words are to be construed in reference to the particular terms which form the subject matter of the instrument, and in furtherance of, but in subordination to the general power conferred. 1873, Geiger v. Boller, 1 Supreme Ct. (T. & C.), 129.
- 4. A power of attorney, giving power to sell and lease lands, and collect moneys due, &c., gives no authority to assign a cause of action for trespass. [3 Bosw., 575.] Ib.
- Exercise of power conferred by law on three or more. People ex rel. Washington v. Nichols, 52 N. Y., 478.

PRACTICE.

A party wishing to review the findings of fact, or conclusions of law, of the judge, may do so by motion for a new trial, upon a case made, to the general term [Code, § 268, as am., 1867], without waiting for final judgment. 1873, Stanton v. Miller, 1 Supreme Ct. (T. & C.), 23.

PRECEDENT.

A fully considered case, determined by a majority of the court, how far to be impugned by dissent, by political consideration, and by subsequent contrary decision. Woodruff v. Woodruff, 52 N. Y., 53.

QUESTIONS OF LAW AND FACT.

PRINCIPAL AND SURETY.

Obligation of one person to defend another whom he has indemnified, or who stands as his surety. 5 Engl. R. (Moak's ed.), 298, n. Costs, 33.

PROBATE.

Probate of a will can not be attacked collaterally, for irregularity in the service of the citation. Ct. of App., 1873, Wetmore v. Parker, 52 N. Y., 450; affirming 7 Lans., 121.

SURROGATE'S COURT.

PROHIBITION.

- The board of police justices of the city of New York, acting under the act of April 17, 1860, in the appointment of clerks, &c., does not act as a "court," within the statute allowing writs of prohibition to issue. N. Y. Superior Ct. Sp. T., 1873, Norton v. Dowling, 46 How. Pr., 7.
- 2. To sustain a writ of prohibition, it is not enough to show that one member of the board was absent, without evidence to rebut the presumption that he was duly notified of the meeting. Ib.

QUESTIONS OF LAW AND FACT.

- Domicile is rather a question of fact than of law, and an intent to change domicile should be established by very clear proof. Dupuy v. Wurtz, 53 N. Y., 556; affirming 64 Barb., 156.
- Under 2 R. S., 137, § 4, the question whether an omission to change possession on a purchase, is fraudulent as against creditors, is for the jury, and cannot be decided as a question of law by the court. [9 N. Y., 218.] Supreme Ct., 1866, Spicer v. Waters, 65 Barb., 227.
- The question of negligence in a banker in discovering a fraudulent alteration of a check, Held, in this case, a question of fact. 1873, Nat. Bank of Commerce v. Nat. Mechanics' Bank, 35 N. Y. Superior Ct. (2 Jones & S.), 282; S. C., 46 How. Fr., 374.
- 4. In an action for malicious prosecution, the question of malice is one of fact for the jury; and of probable cause, is one of law for the court. [6 N. Y., 384.] 1873, Van Voorhes v. Leonard, 1 Supreme Ct. (T. & C.), 148.
- 5. In an action for malicious prosecution it appeared that one S. told defendant that plaintiff and her sister had committed the act for which the alleged malicious prosecution was begun. Subsequently,

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and before the prosecution was commenced, S. retracted his statement, and told defendant he alone had committed the act, and agreed to settle for the injuries done by the payment of five dollars, and repairing the injuries done. *Held*, the question of probable cause was one for the jury [2 Denio, 617], and judgment of nonsuit was error. 1873, Foote v. Milbier, 1 Supreme Ct. (T. & C.), 456; S. C., 46 How. Pr., 38.

- 6. Whether a deed absolute on its face was intended to be a mortgage, is a mixed question of fact and law. It is a mortgage only when it was the understanding and agreement of the parties that it should be such. Supreme Ct., 1872, Brown v. Clifford, 7 Lans., 46
- Evidence making it a question for the jury whether an insurance note was a stock note or premium note. Jackson v. Van Slyke, 52 N. Y., 625.
- 8. The effect of payment of a less sum in full discharge of an unliquidated debt then due, and the giving of a receipt in full therefor, is a question of law for the court, not of fact for the jury. [1 Den., 257.] 1873, Green v. Rochester Iron Manuf'g. Co., 1 Supreme Ct. (T. & C.), 5.
- The presumption of the existence of one fact from the existence of another,—i. e., the process of ascertaining one fact from the proof of another fact,—is within the exclusive province of the jury. Ct. of App., 1873, Justice v. Lang, 52 N. Y., 323.
- 10. The question whether representation as to value is merely an opinion or an affirmation of a fact to be relied on, is a question for the jury. Ct. of App., 1873, Simar v. Canaday, 53 N. Y., 298.
- 11. It is a question of fact for the jury whether or not certain specific articles are working tools within the meaning of the statute [Laws of 1842, ch. 157; Laws of 1859, p. 343, ch. 134], exempting property from levy and sale under execution. [1 Denio, 460.] 1873, Sammis v. Smith, 1 Supreme Ct., (T. & C.), 444.
- 12. The verdict of a jury that a net and boat used for fishing, although requiring two men to handle them, are working tools, will be sustained. Ib.
- 13. Whether certain words used were a warranty, sometimes a question for the jury. Murray v. Smith, 4 Daly, 277.

RAILROADS.

The power given by the general railroad law to take property, does not extend to that which is already held and dedicated by authority of law to a different public use. Matter of Boston & Alb. R. R. Co., 53 N. F., 574.

RECEIVER.

RECEIVER.

- 1. In an action to recover possession of negotiable paper, alleged to have been transferred by plaintiff's collecting agent to defendants, in payment of the agent's precedent debt, the court may properly appoint a receiver, if plaintiff shows an apparent right, and notwithstanding defendants' denial, especially where defendants are insolvent, or have suspended payment. Brown v. Northrop, Ante, 333.
- 2. The former court of chancery, in a suit in the nature of a creditor's bill (as authorized by 2 R. S., 174, § 39), acquired no power over the debtor's land; and the fact that the debtor in such a suit, by order of the court, assigned to a receiver all his real estate, did not deprive him of the power to redeem such real estate from a sale on execution against him. Livingstone v. Arnoux, Ante, 158.
- 3. The order appointing a receiver in supplementary proceedings, required him to execute a bond with sureties. Held, that the terms of the order required an instrument under seal, with two sureties [Edw. on Ree'rs, 89], and that the receiver had no power to act, until he had complied with the order appointing him. [Thompson on Prov. Rem., 477, 480; 21 How., 469; 26 Barb., 569.] 1373, Johnson v. Martin, 1 Supreme Ct. (T. & C.), 504.
- 4. The court, having appointed a receiver, has power to order the reference of a claim against him without action; and it is not necessary on a motion for such reference, to require an agreement to refer. Supreme Ct., 1873, Guardian Savings Inst. v. Bowling Green Savings Bank, 65 Barb., 275.
- 5. Moneys due to a debtor from the public authorities, as a pension, can not be reached by a creditor of the pensioner until actually paid over to the debtor. A pensioner has no property in future payments to be made to him on account of the pension. Nagle v. Stagg, Ante. 346.
- 6. Allowance to a receiver for receiving three hundred and eighty-eight dollars and seventy-four cents rents from a collecting agent, fixed at twenty-five dollars. Costs, &c., in a foreclosure suit to which as receiver he was made a party, refused, on the ground that he should have applied for them in the foreclosure suit. 1872, Baldwin v. Eazler, 34 N. Y. Superior Ct. (2 Jones & S.), 274.

An assignment in the name of J. P., receiver, and signed by him as "J. P, Receiver," contained a covenant that the assigned claims were due and unpaid. *Held*, that the receiver's intent was to covenant officially, and not individually, and that in an action on the covenant against the receiver's representatives, he having been discharged as receiver before his death, plaintiff was properly

REFERENCE,

non-suited. Supreme Ct., 1872, Livingston v. Pettigrew, 7 Lans., 405.

ATTACHMENT, 11, 12.

RECORDER.

Recorders of cities have jurisdiction under the statute [2 R. S., 704], to compel disorderly persons to give security to keep the peace, and in default thereof, to commit them to the common jail. 1873, People v. Mitchell, 2 Supreme Ct. (T. & C.), 172.

RECORD.

The assignment of a mortgage upon real estate is a "conveyance," and the assignee a purchaser, within the meaning of the recording act. [11 Paige, 29; 5 Denio, 187; 47 N. Y., 307; 2 Lans., 471.] 1873, St. John v. Spalding, 1 Supreme Ct. (T. & C.), 483.

RECOUPMENT.

- 1. The right of the maker of a note to recoup against it his claim growing out of a partial or total failure of consideration, is not defeated by a transfer of the note, and the bringing of a suit thereon in the name of the transferee, unless the transferee, the paper being negotiable, has acquired a title discharged of all equities. If he took with notice, the right of the maker to set up a failure of title to the property in payment for which the notes were given, is perfect. Ct. of App., 1873, McKnight v. Devlin, 52 N. Y., 399.
- Recoupment of damages for alleged breach of contract not allowed, where benefits are retained. Carpentier v. Minturn, 65 Barb., 293.

REFERENCE.

- 1. For the purpose of determining the referable nature of an action, its character is fixed by the complaint, and can not be changed by the answer. If the action, as shown by the complaint, is referable because on contract and involving a long account, the fact that the answer recoups or counter-claims damages for an alleged breach of warranty, fraud and deceit, does not change the nature of the action; but this is a defense permitted, to reach speedy justice and avoid circuity. Ct. of App., 1873, Welsh v. Darragh, 52 N. Y., 590.
- 2. In an action by an attorney, for various services, including the management of suits in various courts, the drawing of deeds and other instruments, the examination of titles to lands, charges for disbursements, &c., including many items, where a general denial is interposed,—Held, that the trial of the issues involves the exam-

- ination of a long account, and a compulsory reference may be ordered. N. Y. Com. Pl., 1871, Schermerhorn v. Wood, 4 Daly, 158.
- 3. But an allegation in an answer, to a complaint claiming four thousand five hundred dollars for professional services due February 11th, 1862, that on May 21, 1860, defendant paid to plaintiff two hundred and seventy-five dollars in full of all demands to that date, which sum is set off against any claims of the plaintiff,—Held, not to be an allegation of payment, which, if found in favor of defendant, would determine the action against the plaintiff, and that a compulsory reference might be ordered of all the issues. Ib.
- 4. It is no ground for reversing an order of reference that on the trial one party intends to impeach, as forged, evidence which he expects will be offered by his adversary. Such fact is proper to be presented to the court on the motion for the order, but the decision thereon is conclusive. Ib.
- 5. In an action for goods sold, plaintiff's bill of particulars contained twenty-six items of merchandise, and defendant admitted the number and quantity, but not the articles charged. Held, that as plaintiff must, therefore, prove his account, at least to the extent of identifying the property delivered with that charged, it was a proper case to order a reference. Ct. of App., 1873, Welsh v. Darragh, 52 N. Y., 590.
- 6. The rule that on an accounting a general finding is not sufficient [22 Barb., 319],—reiterated. Spooner v. Lefevre, 2 Supreme Ct. (T. & C.), 666.
- 7. An action on a fire insurance policy is not referable against plaintiff's objection, from the simple fact that the loss claimed covers a large number of items [6 Wend., 503; 2 How., 79; Id., 173; 3 Id., 8; 13 Abb., 124; 25 Wend., 687]. 1874, Brink v. Republic Ins. Co., 2 Supreme Ct. (T. & C.), 550.
- 8. A compulsory order of reference may be vacated at any time before final decree, upon the ground that it was not a referable case, notwithstanding the aggrieved party did not make that a ground of his first motion for that purpose. Ib.
- Upon evidence being offered and objected to, the referee must decide upon its admissibility at once. He has no right to reserve his decision until the final disposition of the case. 1873, Waggoner v. Finch, 1 Supreme Ct. (T. & C.), 145.
- In the absence of evidence to the contrary, it will be presumed that error in such admission of the evidence affected the decision of the case. Ib.
- A referee has not power to issue a commission to examine witnesses out of the State. It is for the court to do so. 1872, Rathbun v. Ingersoll, 34 N. Y. Superior Ct. (2 Jones & S.), 211.

REMOVAL OF CAUSES.

- 12. A referee, while acting as such, can not accept from a party to the cause a retainer in other matters; and if he does so, the fact alone is ground for setting aside his report. Supreme Ct., 1873, Stebbins v. Brown, 65 Barb., 272.
- 13. A referee appointed to sell is entitled to the same fees as, and no more than are allowed to, the sheriff for the performance of the same duty. 1874, Innes v. Purcell, 2 Supreme Ct. (T. & C.), 538.

 APPEAL, 23, 33, 35, 42; Costs, 37; TRIALS, 16.

RELEASE.

- A release given in favor of one of several tortfeasors does not operate to discharge the others, unless under seal. Irvine v. Milbank, Ante, 378.
- 2. After plaintiff has released his cause of action, and stipulated to discontinue the action, his attorney has no right to go to trial; and if he does so and obtains a judgment, the court have no discretion to require payment of the attorney, as a condition for setting aside the report and verdict. Ct. of App., 1873, Pulver v. Harris, 52 N. F., 73; affirming 62 Barb., 500.

RELIGIOUS CORPORATION.

If a member of a religious corporation is wrongfully deprived of the rights of membership, his remedy is by action against the individuals who preclude him from the exercise of his rights. If he is excluded from membership in the church, redress must be had, if at all, by ecclesiastical proceedings under its rules. Ct. of App., 1873, People ex rel. Dilcher v. German U. Ev. Ch., 53 N. Y., 103; reversing 6 Lans., 172; and affirming 3 Id., 434.

REMOVAL OF CAUSES.

- 1. A suit in this court, commenced in Dec., 1865, by a plaintiff resident in this State, against a defendant also then resident here, but who, before final determination thereof, became a resident of another State,—Held, not removable to the U.S. circuit court, under acts of congress of July 27, 1866, or of March 2, 1867, defendant being a resident of this State at the time of the passage of those acts. N. Y. Com. Pl., 1871, Dart v. Walker, 4 Daly, 188.
- 2. Where an application to remove a cause to the U. S, circuit court was founded upon provisions of the act of 1867,—Held, that, although the application must be denied under that act, still where the petition contained the necessary allegations, the application might be granted under the act of 1866. Ib.

REMOVAL OF CAUSES.

- 3. Under a joint petition by two defendants, the application may, under the act of 1866, be granted as to one defendant and denied as to the other. 1b.
- 4. Where a cause has been tried, but the judgment reversed on appeal and a new trial ordered, an application made before the new trial, is made "before trial or final hearing," within the meaning of the act. Ib.
- 5. On a review of the conflicting decisions, it must be held that corporations are citizens of the States which create them, without regard to the residence of the corporators; hence, a national bank whose location and place of business is fixed by law in a particular State, of which, for the purposes of taxation, it is an inhabitant, and in which a majority of the managing officers are required by law to reside, should be deemed a resident of such State, although it is created under an act of congress, not under a State law. Ct. of App., 1873, Cooke v. State Nat. Bank of Boston, 52 N. Y., 96.
- 6. Where, by virtue of a State law, a joint action is brought against several parties on different liabilities,—e. g., against drawers of a check and the certifier of it,—the defendant in either cause of action may apply for a removal without the other joining in the application. Ib.
- 7. Under the act of congress of March 2, 1867, removal of the cause is effected by complying with the statute, and without an order of the court; and the only discretion of the State court is in respect to the sufficiency of the surety [5 Blatchf., 336; 6 Id., 362].
- 8. It seems, that under all the acts of congress, except that of 1866, all of several defendants residing in a State must unite in an application for a removal of the cause to the circuit court; but formal or unnecessary parties need not join. Ib.
- Whether a corporation can make the affidavit of belief required by act of 1867,—query. Ib.
- 10. A suit was commenced in a district court, in which plaintiff claimed to recover two hundred and sixty dollars and interest. The suit was removed to the common pleas, where a judgment was recovered for the full amount claimed. On appeal from that judgment,—Held, that the fact that not more than two hundred and fifty dollars could have been recovered in the district court, did not render it invalid. When the cause is transferred to this court, it becomes subject to all the general rules of practice and principles of law governing cases of like character as to which this court has original jurisdiction. N. Y. Com. Pl., 1873, Ludwig v. Minot, 4 Daly, 481.

SERVICE (AND PROOF OF).

SCHOOLS.

- The assessment of a tax upon the property of an inhabitant of a school district by a school trustee is a judicial act. [35 N. Y., 251.] 1873, Fowler v. Van Riper, 1 Supreme Ct. (T. & C.), 370.
- 2. In an action against school officers for an act performed under color of their office, which might be the subject of an appeal to the superintendent, no costs can be allowed against such officers if they have acted in good faith. [Laws of 1864, ch. 655, § 6.] Ib. Costs, 36.

SEAL.

- A deed of land by a church by its trustees, sealed by a seal opposite the name of each trustee, with a certificate that the church has no corporate seal, is valid. 1873, Christie v. Gage, 2 Supreme Ct. (T. & C.), 344.
- Several persons may bind themselves by a single seal. [2 Caines Cas., 1, 7, 42, 55; 9 Johns., 285; 4 Hill, 351.] Ib.

SERVICE (AND PROOF OF).

- The Code [section 135] makes no provision for service by publication upon unknown parties in partition cases. The only method to be pursued in such cases is the one provided in the Revised Statutes [3 R. S., 5 ed., 605], and this must be strictly pursued. 1873, Sanford v. White, 1 Supreme Ct. (T. & C.), 647; S. C., 46 How. Pr., 205.
- 2. The affidavit upon which an order of publication was obtained stated that the defendant could not be found within the State, although due search was made for him; that he was a resident of Berlin in the empire of Germany, where he then actually resided to the knowledge of the plaintiff who verified it. Held, although materially defective in not showing what efforts had been made to find the defendant [Code, § 135], it had a legal tendency to make out a proper case, and the order founded thereon would be sustained until set aside by a direct proceeding for that purpose. [4 Denio, 118; 3 N. Y., 41, 46.] 1874, Von Rhade v. Von Rhade, 2 Supreme Ct. (T. & C.), 491.
- 3. The order of publication required that the summons in the action be published, and the copy annexed required the defendant to answer in six instead of twenty days. Held, that the recital in the order that a copy of the summons was annexed, when in fact it was not, did not render the direction invalid, and since it was followed by the publication of the summons in the action no injury resulted. Ib.

SHERIFF.

- 4. The order directed that a copy be mailed to the defendant at his residence, Berlin, Germany. The copy mailed was addressed to him at the Union Club, Berlin. The affidavit showed that was his residence. *Held*, a substantial compliance with the order. *1b*
- Service of citation, and proof thereof, to attend probate of a will, may be made by the proponent or other party. Ct. of App., 1873, Wetmore v. Parker, 52 N. Y., 450; affirming 7 Line., 121.
- Date in admission, not conclusive. Rogers v. Schmevsahl, 2 Supreme Ut. (T. & C.), 668.

FORMER ADJUDICATION, 1; JUDGMENT, 2-5; PLEADING, 23.

SET-OFF.

- 1. A party having a judgment against another, is not entitled at law nor in equity to set it off against a judgment for costs in a subsequent litigation commenced by such party, against the rights of the attorney who obtained the latter judgment, which rights were secured to him by an express contract in writing, transferring such costs to him before any judgment was rendered. And notice is not necessary to a party who is not injured by the want of notice. Ct. of App., 1873, Perry v. Chester, 53 N. Y., 240; modifying 12 Abb. Pr. N. S., 131.
- 2. The statutes relating to off-sets and counter-claims have no application to the proceedings provided for the removal of tenants for the non-payment of rent. They are solely applicable to actions, and to such actions only as are mentioned in the statutes. [2 R. S., 234 (3 R. S., 5th ed., 434-5), § 48, subd. 5; Id., 354, § 18 (5th ed., 634, 635, § 12), subd. 5; Code, § 150.] 1874, People ex rel. Tuttle v. Walton, 2 Supreme Ct. (T. & C.), 533.
- Right of set-off in action on policy issued on account of whom it
 may concern. Pacific Mail St. Co. v. Gt. Western Ins. Co., 65
 Barb., 334.

SHERIFF.

- The sheriff is entitled to no fees except such as are allowed by statute. N. Y. Com. Pl., 1874, Crofut v. Brandt, 46 How. Pr., 481; affirming 13 Abb. Pr. N. S., 28.
- A promise to pay him extra compensation for extra services in the
 performance of his official duty, or such acts as are incident thereto
 is void. [Chitty on Contracts, 582; 15 Wend., 44.] Ib.
- 3. Whatever care, labor or expense the condition of the property levied on required, beyond what his fees compensated him for, the sheriff was bound to provide, and except as to existing liens, bear as part of his official duty. [5 D. & R., 495; 3 B. & C., 688; 3 Camp., 374; 7 M. & W., 413; 15 Wend., 44.] 1b.

SPECIFIC PERFORMANCE.

- 4. A sheriff has no right to charge for keepers [37 N. Y., 380; 3 Daly, 256; 38 How., 173], nor for auctioneer's charges in selling the goods, for he is bound to make the sale of the goods himself. [Chitty on Contracts, 583; 2 T. R., 157; Crocker on Sheriffs, 2 ed., § 1, 162.] Ib.
- A judgment of the marine court becomes a judgment of this court under these rules, upon a transcript being filed with the county clerk. Ib.
- 6. The construction of the provisions of 2 R. S., 645, § 33, is governed by the Code, § 243; and under this a sheriff is entitled to poundage only on the sum which he collects, not upon the amount levied on, even though the amount collectible was reduced after levy. 1873, Campbell v. Cothran, 1 Supreme Ct. (T. & C.), 70; S. C., less fully, 65 Barb., 534.
- 7. A sheriff in seizing property which had been set apart to plaintiff by the assignee in bankruptcy, under an execution on a judgment entered before proceedings were taken in bankruptcy, is protected by his process [21 Wend., 351; 1 N. Y., 505; Crocker on Sheriffs, 220]; and this rule applies in an action of replevin. [4 Wend., 485; 50 N. Y., 353.] 1873, Barron v. Boyd, 1 Supreme Ct. (T. & C.), 457.
- When a claim is made against the sheriff for money in his hands, and there is doubt on the question, the proper course is to leave the claimant to an action. Ct. of App., 1873, Mills v. Davis, 53 N. Y., 349; affirming in effect 35 N. Y. Superior Ct. (3 Jones & S.), 355.
- 9. Defendant, a sheriff, became liable as buil for a prisoner arrested on civil process. Execution being returned unsatisfied plaintiff brought this action against defendant. While the action was pending the defendant surrendered prisoner in the county jail. Held, defendant was entitled to the privileges of bail [9 How., 180; Id., 188; Code, §§ 191, 186], and to be exonerated on payment of costs of these proceedings. 1874, Brady v. Brundage, 2 Supreme Ct. (T. & C.), 621.

ATTACHMENT, 2-7; ATTORNEY AND CLIENT, 8; CLAIM AND DELIVERY; DEMAND, 4; TRIALS, 18.

SPECIAL PROCEEDINGS.

Proof before town auditors, to obtain leave to plant oysters, must be common-law proof by production of witnesses. Southard v. Wright, 2 Supreme Ct. (T.& C.), 674.

SPECIFIC PERFORMANCE.

1 A court of equity may enforce specific performance of a contract to sell land, although the land is situated in another State, and the contract was made and to be performed there, if defendant was

SPECIFIC PERFORMANCE.

duly served and subjected to the jurisdiction of the court. N. Y. Com Pl., 1872, Myres v. De Mier,* 4 Daly, 343.

- 2. It seems, that a contract by which A. agrees to sell and convey his land to B. for a specified sum, to be paid in part by B.'s conveying other land to A., and B. agrees to sell and convey such other land to A., for a specified price to be paid by A.'s said conveyance to B., is an agreement for an exchange, not for sales; and if one party proves unable to convey title, he can not be compelled specifically to perform as to his purchase of the other parcel. Sternberger v. McGovern, Ante, 257.
- 3. Whether specific performance with money compensation for an inchoate right of dower, can be awarded in case of an exchange of lands as well as in case of a purchase, —query? Ib.
- 4. Plaintiffs and defendant agreed to exchange certain parcels of real estate, but defendant, being unable to fulfill his agreement on account of the refusal of his wife to release her dower (although he in good faith endeavored to induce her to do so),—Held, that defendant should not be compelled to give a deed by himself, and indemnify plaintiffs against his wife's contingent right of dower but plaintiffs would be given damages for breach of the contract. 1b.
- 5. Whether specific performance can be enforced, where no provision is made for determining the price with certainty,—query? Sharkey v. Larkins, 52 N. Y., 623.
- 6. In an action for specific performance, where the vendor is unable to convey such title as is required by the contract, the court may retain the action, and ascertain and award damages for non-performance [11 Paige, 277; 18 Barb., 350; 24 N. Y., 40], if inability to perform at the time of judgment is made to appear at the trial. And the court may give a lien on the vendor's title for advances made by the purchaser [3 Drew, 396; 3 Mer., 237; Fry, 495], but not for his damages. 1874, Stevenson v. Spratt, 35 N. Y. Superior Ct. (3 Jones & S.), 496.
- 7. A covenant in a lease to repair, will in a proper case, be specifically enforced in equity. The cases in which the contrary is expressed, shown to have been loosely determined, without due examination of the authorities. N. Y. Com. Pl., 1873, Beek v. Allison, 4 Daly, 421.
- 8. What is to be done under the covenant, however, must be clear, definite, and certain, for if it be extensive, involving too many details, which demand the consideration of the particular circumstances and the exercise of judgment, as well as a long time for its

^{*}Affirmed, on another ground, in 52 N. Y., 647. xv.—n. s. - 37

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- performance, the party will, unless the equities are very strong, be left to his remedy in an action for damages. This branch of equitable jurisdiction is the exercise of a discretion which depends upon the facts and circumstances of each particular case. Ib.
- 9. If the contract was just and fair when entered into, events afterwards occurring, which are not so involved in it that they must have been in the minds of the parties when the contract was made, can not be invoked to show the hardship of, and to excuse performance, unless they were in some way due to the party who applies for the specific performance. They may be taken into consideration, however, where the court can, instead of decreeing a specific performance, make a more equitable disposition of the whole matter. Ib.
- 10. If plaintiff knew, when he brought his suit, that defendant could not perform, either from his having conveyed the property to another, or from any other cause, the complaint must be dismissed, plaintiff's remedy being an action for damages, which is not only an adequate, but his sole remedy; defendant in that case being entitled as a matter of right to a trial by jury. Ib.
- 11. But where it is averred in the complaint, and appears from the facts set forth in it, that defendant can and ought to perform, the jurisdiction in equity attaches, defendant is put to his answer, and the case comes before the court upon the issue and the proofs for its equitable consideration. If it then appear, upon defendant's showing, that he has disabled himself from performing, and in doing so acted inequitably, the court may decree to plaintiff a compensation in money, to be ascertained by some equitable rule, or by a trial by jury; because the plaintiff, being ignorant when he brought his suit of the defendant's disability, had a right to bring it; and jurisdiction having attached by the institution of a suit justly and properly brought, it may be made effectual for the purpose of administering complete relief. Ib.
- 12. The cases reviewed, relating to the right of a court of equity, where it refuses a specific performance, to award a compensation in damages, their conflict with each other considered, and the rule deducible from them laid down. 1b.
- 13. If jurisdiction in equity attaches, as where performance is not impossible, but exceedingly onerous, the court is not bound to decree a specific performance, if it can, by adapting the remedy to the special circumstances of the particular case, make a more equitable adjustment of the whole matter. 1b.
- 14. Where a purchaser at judicial sale afterwards promises to waive the sale and to reconvey to the debtor, and the latter, relying upon the promise, loses opportunity to move to open the sale, the court may

STIPULATION.

compel specific performance of the promise equally, as in the case of an agreement made before the sale, especially where there has been part payment. Supreme Ct., Sp. T., 1873, Morrill v. Cooper, 65 Barb., 512.

- 15. The rule that a contract set up in the answer which does not correspond with that alleged in the complaint, is not sufficient to take the case out of the statute,—reiterated. *1b*.
- 16. Taxes paid by defendant, and interest on a mortgage which plaintiff by his contract had assumed, -Held, allowable to the defendant under the circumstances, and not voluntarily made, as he was bound to protect the title. Duffy v. Donovan, 52 N. Y., 634.

CosTS, 38.

STATUTE.

- Doubtful language in a statute, not sufficient to take away jurisdiction of State courts. Ct. of App., 1873, Cooke v. State Nat. Bank of Boston, 52 N. Y., 96.
- The word may not construed as shall, unless the context shows such intent, or the public have an interest in the exercise of the power. People ex rel. Dunkirk, &c. R. R. Co. v. Batchellor, 53 N. Y., 128.
- The act regulating the mode of impanneling jurors is not necessarily inapplicable on the trial of offenses perpetrated prior to the act. Ct. of App., 1873, Stokes v. People, 53 N. Y., 164.

STAY OF PROCEEDINGS.

The court ought not to grant an extension of time to appear, nor should it grant a stay of proceedings on the application of a defendant who has not appeared in the action. Bragelman v. Berding, Ante, 22.

APPEAL, 16, 17, 18; Costs, 31; Injunction, 10, 11.

STIPULATION.

- 1. Stipulations, although in the nature of a contract, are liable to be dealt with summarily by the court, so long as the parties can be restored to the same condition in which they would have been had no stipulation been made; and the court have power to set a stipulation aside even after order entered thereon. Ct. of App., 1873, Barry v. Mut. Life Ins. Co., 53 N. Y., 536.
- 2. Notwithstanding rule 16, that stipulations of counsel, not being in writing, are void, where an oral stipulation or representation has

SUMMARY PROCEEDINGS.

been acted on, the party making it is not permitted to restrict and take advantage of acts or omissions of his adversary thereby in duced. Such stipulation at least may be enforced by the court in its discretion. Ct. of App., People v. Stephens, 52 N. Y., 306.

3. Under an order of the court extending defendant's time to answer, on condition that he signed a stipulation to take short notice of trial, and that the date of issue should be of the date when the answer was originally due, a stipulation to that effect was made, and defendant accepted notice of trial, and the cause was placed on the calendar before the answer was served. After the commencement of the term the answer was served, but no affidavit of merits was filed, and plaintiff took an inquest and entered judgment. Held, that the judgment was regularly entered. Burroughs v. Garrison, Ante, 144.

APPEAL, 5.

SUBMISSION.

- 1. Where a case is agreed upon and submitted, in a controversy, without action, under section 372 of Code of Procedure, admissions contained in the case are binding on the parties agreeing to it, and although there may appear in the case evidence casting doubt on the truth of the matter admitted, it will be presumed that there is other evidence not produced, or other reasons which induced the admission. N.Y. Com. Pl., 1873, Fearing v. Irwin, 4 Daly, 385.
- 2. If the admission was improvidently made, the injured party has his remedy by motion, to strike out or amend the admission. Ib.

SUMMARY PROCEEDINGS.

- In summary proceedings to recover possession of lands, where the
 affidavit is made by the agent of the landlord, the fact of such
 agency must be affirmatively stated in the affidavit. It is not
 enough that it is stated by way of recital. [4 Den., 71; 7 Hill, 178;
 1 Den., 662.] 1873, People v. Johnson, 1 Supreme Ct. (T. & C.),
 578.
- 2. In summary proceedings to recover possession of lands, an appearance by a party for the sole purpose of objecting to the jurisdiction of the officer, or the regularity of the proceedings, does not waive the defects in the proceedings preliminary to such appearance. [4 Den., 71.] Ib.
- 3. In summary proceedings to recover possession of land, the summons must be made returnable either the same day or in not less than three days. It can not be made returnable the following day. 1874, People v. Lanc, 2 Supreme Ct. (T. & C.), 522.

SUPPLEMENTARY PROCEEDINGS.

- 4. A summons returnable on the day on which it was issued, gives no jurisdiction, except in case of a holding over by a tenant after expiration of term. [Laws of 1868, ch. 828, § 1; 2 R. S., 503, § 30.] Ct. of App., 1873, People ex rel. Sheridan v. Andrews, 52 N. Y., 445.
- 5. The redemption of premises forfeited by the issue of a warrant in summary proceedings can not be effected under the statute [Laws of 1842, ch. 240, § 1] by anything less than the payment of all the rent in arrear, and the costs and charges. Supreme Ct., Sp. T., 1873, Crawford v. Waters, 46 How. Pr., 210.
- 6. Such required payment can not be reduced by so much as the landlord may have received for rents or other income, or benefit, during the period of the landlord's possession subsequent to the execution of the warrant. He can only be called upon to account
 after a redemption under the statute has been effected. But if the
 landlord has accepted payment of a less sum, an accounting may
 be had to ascertain whether there has been a waiver. Ib.

LEASE.

SUNDAY.

The statute does not forbid society meetings on Sunday, nor the service at a Sunday meeting of notice to attend another meeting. Supreme Ct., 1873, People ex rel. Corrigan v. Father Matthew Benev. Society, 65 Barb., 357.

SUPERIOR CITY COURTS.

- Execution issued out of the superior court of the city of New York will be set aside, on motion, if it appears that defendant was a nonresident of the city, and it does not appear that the action was one within the jurisdiction of the court, as defined in Landers v. Staten Island R. R., Co., 14 Abb. Pr. N. S., 346. Noe v. Christie, Ante, 346.
- Under the superior city courts act of 1873, the New York superior court has authority to issue a writ of prohibition to restrain an inferior court. N. Y. Superior Ct., Sp. T., 1873, Norton v. Dowling, 46 How. Pr., 7.

SUPPLEMENTARY PROCEEDINGS.

1. In a proceeding to examine a third person, alleged to have property of the debtor or to be indebted to him, it is not essential, to confer jurisdiction, that the affidavit should be positive, or give evidence of such property or indebtedness; an affidavit on information and belief is sufficient, at least to confer jurisdiction. Ct of App., 1873, Miller v. Adams, 52 N. Y., 409.

SURROGATES' COURTS.

- 2. Where the affidavit, on which to obtain an order for examination, is made by an attorney of the judgment creditor, proof of the authority of the attorney is not essential to confer jurisdiction upon the judge. *Ib*.
- 3. Proof of failure of the debtor or third person, to appear before the judge at the specified time and place for examination, need not be made by affidavit. It seems, that the judge may take judicial cognizance of the failure to appear. Ib.
- 4. A creditor in supplementary proceedings, who neglects to adjourn or extend the proceedings after examination of the debtor has been had, thereby allows the proceedings to drop, and can not subsequently, without notice to the debtor, compel a witness to appear and testify. Thomas v. Kircher, Ante. 342.
- 5. Insurance moneys on household furniture (in this case two hundred dollars) can not be reached, during a reasonable time to allow the debtor to replace the exempt articles. Supreme Ct., Sp. T., 1873, Cooney v. Cooney, 65 Barb., 524.

SUPREME COURT.

Power to investigate the necessity of a local improvement on application for the appointment of commissioners. Matter of Fowler, 53 N. Y., 60.

SURROGATES' COURTS.

- The surrogate can not allow the testimony and proceedings on an application for probate to be withdrawn from his court, on abandonment of the proceedings by the proponent. Matter of Greeley's Will, Ants, 393.
- 2. Nor can the court, on consent of the guardian ad litem of an infant, or his counsel, refuse or allow probate without formal proof and an actual decision upon the merits. 1b.
- 3. The decided testimony of testatrix's physician, whose opinion was formed from her condition and not from conversations with her, and who had not seen her frequently, against her mental capacity, while the testimony of another physician, whose opinion was formed from a statement of the case, was unqualifiedly in favor of it, as was the evidence of lay witnesses, whose intercourse was frequent, and who were witnesses to the codicil, though evidently colored and showing bias,—Held, not sufficient to warrant the rejection of the codicil by the surrogate. The question was a proper one for a jury, and a feigned issue was accordingly awarded on appeal. Supreme Ct., 1873, Crolius v. Stark, 7 Lans., 311.

TAXES.

- A surrogate can only award taxable costs to litigants. It is error to allow a sum in gross to the counsel of the prosecuting party. Ct. of App., 1873, Reed v. Reed, 52 N. Y., 651.
- 5. The review by the supreme court of the decision of the surrogate upon the probate of a will, is in the nature of a rehearing in equity [34 N. Y., 190; 22 Id., 420], and the rule in such cases is, that if the facts established by legal and competent evidence are sufficient to uphold the decree, it will be sustained, if substantial justice has been done, though, technically, evidence was improperly admitted or rejected. 1873, Harper v. Harper, 1 Supreme Ct. (T. & C.), 851.
- Appeals from these courts are not regulated by the Code. Howland v. Taylor, 53 N. Y., 627.
- 7. Where, upon an appeal from the decision of a surrogate, it appears that all the evidence is not before the appellate court, it will be presumed that there was evidence to sustain the decision, and it will be affirmed. 1873, McKinstry v. Sanders, 2 Supreme Ct. (T. & C.), 181.
- 8. Where the decree of a surrogate has been affirmed by the supreme court, upon appeal, and remitted by that court for further proceedings, the surrogate can not open the decree and grant a rehearing for alleged error in law, but must give effect to the judgment of the appellate court. Ct. of App., 1873, Reed v. Reed, 52 N. Y., 654.
- Surrogates' courts have power to issue attachments to punish executors and administrators for a breach of their trust. Timpson's Estate, Ante, 230.
- The case of the Matter of Watson, 3 Lans., 408, explained and qualified. Ib.

TAXES.

- 1. The conflicting cases in reference to the personal liability of tax assessors reviewed, and the distinction declared to be that when the officers have power to act, but err in the exercise of the power,—as when the person and the property are taxable within the statute, but they misjudge as to the value or other ground of a partial exemption, the assessors are not liable in damages. But where they have no power to act, as where they assess either a person who is not one within their jurisdiction, or assess property of a nature which the statute exempts, they act without jurisdiction, and their decision that they have jurisdiction does not aid them, but they are liable in damages. Ct. of App., 1873, National Bank of Chemung v. City of Elmira, 53 N. Y., 49; reversing 6 Lans., 116.
- 2. Relief of lessee from non-payment of taxes, and in what cases granted. Giles v. Austin, 34 N. Y. Superior Ct. (2 Jones & S.), 171.

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- Rolling stock of a railroad, Held, personal property leviable for payment of a tax. Randall v. Elwell, 52 N. Y., 521.
- Proceedings to compel repayment of illegal tax. Matter of Farmers' National Bank of Hudson, 1 Supreme Ct. (T. & C.), 383.

CONSTITUTIONAL LAW, 2; INJUNCTION, 12; MUNICIPAL CORPORA-TIONS, 8, 4; PARTIES, 47.

TRIALS.

- Where defendant pleads a fact, both as bar and as a counter-claim, if it can not avail as both, he is entitled to elect at the trial, even after he finds the fact unavailable in one aspect. 1873, Alger v. Vanderpoel, 34 N. Y. Superior Ct. (2 Jones & S.), 161.
- 2. A complaint by several plaintiffs should not be dismissed at the trial, on motion on the ground of misjoinder of plaintiffs, if either has a good cause of action. The motion should be for dismissal as to the one in whom no right of action appears. Ct. of App., 1873, Simar v. Canaday, 53 N. Y., 298.
- Misjoinder of actions, or variance from summons, not ground of objection at trial. Leach v. Leach, 2 Supreme Ct. (T. & C.), 657.
- 4. An action was begun against three defendants, copartners, who appeared by a firm of attorneys, and served a joint answer. Subsequently one of defendants' attorneys died, and the other acted for said defendants, but served no notice of substitution. Two of the defendants subsequently compromised and settled their proportion of the joint liability, and received a release and discharge from the plaintiff. Plaintiff's attorney served a notice of trial on defendants' surviving attorney, who admitted service. Upon the back of the notice of trial was indorsed "You will also take notice that no personal claim is, or will be made on the trial of this cause as against defendants D. or P., who have compromised, either for damages or costs, and that judgment will be demanded only as against the defendant S. for the amount of damages and costs for which he may be liable." Hebl, regular as to all. Supreme Ct., Sp. T., 1873, Saxton v. Dodge, 46 How. Pr., 467.
- 5. And where, upon the trial, the counsel for defendants appear and announce that they appear, only for the defendants who have compromised, and object to the inquest as to them, putting in evidence only the notice of trial, and judgment is rendered against all for the full amount claimed, the proceedings and judgments are regular as to all. Ib.
- 6. Where the facts stated in a complaint upon a money demand on contract are admitted, and nothing is required to be done to entitle plaintiff to a complete judgment in his favor, but a mere computation of interest on the demand for the period claimed, defendant,

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upon an affirmative defense set up in his answer, has the right to open and close. N. Y. Com. Pl. 1872, Brennan v. Security, &c. Ins. Co., 4 Daly, 296.

- 7. Where a fact is immaterial unless connection with a party is proved, an offer to prove the fact, and subsequently to give proof of such connection, may be refused, in the discretion of the court. Carnes v. Platt, Ante, 337.
- 8. If an answer, setting up failure of title by adjudication of forfeiture under the internal revenue act, is defective, in not sufficiently stating the acts by which the forfeiture was incurred, objection must be taken at the trial, so that it may be amended. Ct. of App., 1873, McKnight v. Devlin, 52 N. Y., 399.
- 9. In an action to recover damages for personal injuries by a railroad accident, plaintiff offered to prove that a patent brake was in use on other railroads which was not used by defendants. The court said that if defendants should give evidence as to distances and speed which would make the use of the brake material, plaintiff would be allowed to recall the witness. Held, that the fair meaning was that in such case plaintiff might go into evidence on those points not being restricted to a single witness. Supreme Ct., 1873, Costello v. Syracuse, &c. R. R. Co., 65 Barb., 92.
- 10. Great latitude should be allowed on cross-examination; and unless matters proposed to be proved are clearly incompetent, they should be received, or a new trial be granted for their exclusion, unless the court can say that the party offering could not have been injured by the rejection of the evidence. Supreme Ct., 1873, Garfield v. Kirk, 65 Barb., 464.
- 11. A referee should decide the question as to the admissibility of evidence when the evidence is offered, so that the parties may govern themselves accordingly. He can not reserve the question and decide it on the final disposition of the cause. Supreme Ct., 1873, Wagener v. Finch, 65 Barb., 493; S. C., as Waggoner v. Finch, 1 Supreme Ct. (T. & C.), 145.
- 12. Dower is unquestionably a strict legal right, and when the right is controverted, even in an equitable action for admeasurement, the question of right must be tried by a a jury. [2 Bro., 633; 2 Ves. Jr., 128; Parks on Dower, 329; 5 Johns. Ch., 488; 4 Kent Com., 72; 4 Paige, 100; 36 N. Y., 572; 44 Id., 553.] 1873, Kinne v. Kinne [No. 2], 2 Supreme Ct., (T. & C.), 393.
- 13. The court at special term, after trying an equity case which remains in its hands under advisement, has power of its own motion to direct certain issues therein to be tried by a jury [Code, § 254; 51 N. Y., 43; 12 Barb., 385; 52 N. Y., 47; 8 Paige, 455; 16 How., 297; Clarke, 580; 22 Wend., 586; Barnondist. Ch., 90; 2

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Hare, 218; 4 Id., 327; 12 Cl. & F., 833; 10 Ves., 495; 6 Cl. & F., 232; McCl. & Y., 436; 1 Russ. & Myl., 547; 6 Cl. & F. App. Cas., 532]. 1874, Brinkley v. Brinkley, 2 Supremo Ct. (T. & C.), 501.

4. The Code has not changed the former practice as to a feigned issue, except so far as to substitute a simple interrogatory for the

legal fiction of a wager. Ib.

- 15. When a specific question of fact only, is ordered to be tried by a jury, it is not a trial of the issue by jury. The facts found by the jury must be approved by the court before they are made the bases of a judgment, and if approved they become, by adoption, the findings of the court. These findings should be specified in the statement required by section 267, together with other facts found by the court without the intervention of a jury. Ct. of App., 1873, Vermilyea v. Palmer, 52 N. Y., 471.
- 6. A party does not lose his right to a jury trial by appearing and proceeding under a compulsory order of reference. [3 Barb., 232.] 1874, Brink v. Republic Fire Ins. Co., 2 Supreme Ct. (T. & C.), 550.
- 17. Where a complaint has been dismissed as to defendants who would be necessary parties if any equitable relief were to be granted in the action, and but a single issue is to be tried, and that is a question for the jury, the cause will be stricken from the special term calendar, and sent to the circuit for trial. Supreme Ct., 1873, Vose v. Florida R. R. Co., 46 How. Pr., 424.
- A sheriff has no right to summon talesmen in an action to which he is a party. [5 Johns., 133.] 1873, Howe v. Brundage, 1 Supreme Ct. (T.& C.), 429.
- 19. In the examination of contested questions of fact, the onus probandi may, in the course of the trial, be thrown from one party to the other several times, as the complexion of the proof may change. [5 Greenl., 211.] And the test is to consider which party would be successful if no more evidence were given. [1 Phil. on Ev., 812.] [Per Potter, J.] 1873, People ex rel. Judson v. Thacher, 1 Supreme Ct. (T. & C.), 158.
- 20. The rule that in actions for negligence all questions of fact as to which there is any conflict of evidence must be submitted to the jury,—reiterated. 1873, McGrath v. N. Y. Cent. & Hudson River R. R. Co., 1 Supreme Ct. (T. & C.), 243.
- 21. In an action for damages caused by nuisance, and to restrain such nuisance, defendant demanded and obtained a trial by jury. Plaintiff had a verdict for twenty-five dollars. The court, upon the evidence given before the jury, found the facts relating to the equitable questions in the case, and ordered judgment for a perpetual injunction, and for twenty-five dollars damages. Held, error. The action was not triable by a jury, because it was of an equitable

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nature; otherwise, in a legal action brought in place of the old writ of nuisance. 1873, Parker v. Laney, 1 Supreme Ct. (T. & C.), 590.

- 22. After verdict, the court could not, without consent of the parties, find the fact by which the right of equitable relief to the plaintiff was to be determined. The verdict will not be set aside, but a new trial of the right to equitable relief must be had. 1b.
- 23. On the trial of questions of fact by a jury in an equitable action, the rules of equity govern the admission of evidence. Supreme Ct., 1872, Brown v. Clifford, 7 Lans., 46.
- 24. Rule 40 of the supreme court,—providing that when a feigned issue has been had neither party shall be allowed to question the rulings on the trial at the final hearing or subsequently, unless he has moved for a new trial,—does not preclude the court on the final hearing from rejecting the verdict and ordering a new trial, on its own motion, or from deciding the question of fact for itself. *Ib*.
- 25. In an action for slander, after the court has determined that the communication is privileged, it must be left to the jury to say whether it has been shown that defendant was actuated by express malice. [46 N. Y., 431; 16 Id., 375.] 1872, Clapp v. Devlin, 35 N. Y. Superior Ct. (3 Jones & S.), 170.
- 26. In the trial of an action for damages for an eviction, it is error to allow evidence as to the difference between the rent of the demised premises and those to which plaintiff removed, without it first appearing in evidence what was the situation, convenience, and equality of accommodation of the premises removed to, as compared with the demised premises, and in case the eviction was not forcible nor sudden, that plaintiff had made diligent efforts to get suitable premises of as good class, at the same rent, and failed. N. Y. Com. Pl., 1871, Doucker v. Simon, 4 Daly, 53.
- 27. The salutary rule that a party must exhaust his evidence before resting, may be disregarded in the discretion of the court. 1873, Simmons v. Lyons, 35 N. Y. Superior Ct. (3 Jones & S.), 554.
- 28. The rule that a general motion, specifying no grounds for a non-suit, is unavailable to raise an exception [37 N. Y., 526; 49 Id., 583],—reiterated. 1873, Jennings v. Whittemore, 2 Supreme Ct. (T. & C.), 377.
- 29. The objection that plaintiff has a remedy at law can not be made at the hearing if not set up in the answer. [6 N. Y., 147.] Ib.
- 30. The rule that a court of equity having jurisdiction of the subject matter, and being competent to give relief, will retain a cause for all purposes [2 Paige, 509; 3 Id., 313; 11 Id., 596],—reiterated. Ib.
- 31. The rule applicable to motions for nonsuit, that requires defendant to specify objections which, if specified at the time, could be obvinted by proof, is applicable to the case of a defendant who becomes

- actor in seeking to enforce a counter-claim. Plaintiff can not avail himself, on appeal, of the objection that there was no specific proof of damages, unless the objection was taken at the trial, so that defendant might have supplied the defect. Ct. of App., 1878, Isham v. Davidson, 52 N. Y., 237.
- 32. Plaintiff brought trespass for breaking his close and causing damage. Defendant proved title in himself and easement in plaintiff, and the complaint was dismissed. *Held*, since the action was for trespass, and no motion to amend, the discretion of the judge in dismissing the complaint was not unwarranted. 1874, Birdsall v. Williams, 2 Supreme Ct. (T. & C.), 605.
- 23. Where, on the trial of an action on a policy of fire insurance, plaintiffs swear to their loss at a certain fixed sum, and defendants introduce circumstantial evidence to show that it could not have been more than a certain smaller sum, it seems, the referee or jury is not bound to adopt either estimate, but may give a verdict for an intermediate sum,—and Held, if it is an error, it is one of which plaintiff alone can complain. N. Y. Com. Pl., 1871, Unger v. People's Fire Ins. Co., 4 Daly, 96.
- 34. Where two different rules for measuring damages exist, a party may give evidence tending to establish the amount according to either rule, leaving it to the jury to select that rule which is most just in the particular case. 1973, Cook v. Soule, 1 Supreme Ct. (T. & C.), 116; said to have been affirmed in Ct. of App., 2 Id., iv.
- 35. Requests to charge must be presented in hearing of the opposite counsel, and before the jury leaves the box. 1872, Tinkham v. Thomas, 34 N. Y. Superior Ct. (2 Jones & S.), 236.
- 36. The judge is not bound to repeat in his charge what he has, in effect, distinctly charged; and it is not error to refuse a request so to do. 1873, Barber v. Marble, 2 Supreme Ct. (T. & C.), 114.
- 37. In an action against a ferryman for damages, an instruction to the jury that it was defendant's duty to have put up proper and necessary barriers to save the owners of property on his boat from the casualties to which it might from its nature be possibly subjected, may be construed in connection with the context, and at any rate is not available as error unless the particular point was excepted to.

 Ct. of App., 1873, Wyckoff v. Queens Co. Ferry Co., 52 N. Y., 32.
- 38. Proper terms of charge in reference to fraudulent assignment of chattels. Cohen v. Kelly, 35 N. Y. Superior Ct. (3 Jones & S.), 42.
- In action for running over foot passengers at a railroad station.
 Maginnis v. N. Y. Central & H. R. R. R., 52 N. Y., 215.
- 40. In actions for injuries to horse by falling through defective pier. Clancy v. Byrne, 65 Barb., 844.
- 41. Where the charge to the jury ignored the testimony for the de-

fense, and defendant's counsel objected without requesting a charge upon his testimony, he can get no benefit from his exception. Supreme Ct., 1873, Magoverning v. Staples, 7 Lans., 145.

42. The presiding justice at a trial by jury, after directing a verdict for plaintiff, may still reserve the case for future consideration under section 264 of the Code. Ct. of App., 1873, Shellington v. Howland, 53 N. Y., 371.

- 43. Where, after commencement of a trial by jury, the jury are, by consent of counsel, directed to find on specific questions, and, after the verdict on those questions, the cause is determined by the court without further aid from the jury, the trial is to be deemed a trial by the court without jury. Such consent waives previous requests to charge; and the verdict is not to be deemed a special verdict within section 261 of the Code. The proceeding is not a mistrial, but has the same effect as if the facts found by the jury had been admitted by the pleadings or by stipulation. Ct. of App., 1873, Carr v. Carr, 52 N. Y., 251; affirming 4 Lans., 314.
- 44. The complaint on a note alleged that plaintiff had sold a thing pledged as security, and applied the proceeds. The answer, admitting the sale, alleged that it was tortious, because made without demand, and charged plaintiff with conversion. Held, that defendant might have objected at the trial that plaintiff was precluded from showing that at the sale the thing pledged was bid in by himself; but not having taken the objection he waived his right, and that a finding, irrespective of the pleadings, that there was no conversion, was proper. Ct. of App., 1873, Bryan v. Baldwin, 52 N. Y., 232; affirming 7 Lans., 174.
- 45. It seems, that the objection that the verdict is against the weight of evidence is not waived by omitting to ask that a verdict be directed, where the party subsequently moves for a new trial on a case and exceptions. Carnes v. Platt, Ante, 387.
- The decision in this case, reported in 1 Sweeny, 145,—explained, and the report corrected. Ib.
- 47. The verdict is not unalterable when entered in the clerk's minutes, even where it was brought in sealed, if the jury, on being polled, dissent. The true rule is, that after the verdict has been received and entered, and the jury has been dismissed, they have not the power to reassemble and alter the verdict. [16 Serg. & R., 414.] Before they have been dismissed from their relation to the case as jurors, their power remains to alter the verdict so as to conform it to their real and unanimous intent. Where they brought in a sealed verdict for six thousand dollars, and on being polled did not agree as to interest, and were allowed to retire and bring in a new verdict for seven thousand dollars,—Held, that the latter verdict was regular.

TRUSTS AND TRUSTEES.

Ct. of App., 1873, Warner v. N. Y. Central R. R. Co., 52 N. Y., 437.

- 48. The rules that, on a general verdict for plaintiff, necessary facts are presumed to have been found in his favor, and that if there was no request to charge nor exception to the charge, every intendment is in favor of the jury,—applied. 1873, Murphy v. Lippe, 35 N. Y. Superior Ct. (3 Jones & S.), 542.
- 49. Where four persons are jointly indicted for felony, three of them have no right to require that the fourth shall be tried jointly with them. [19 Wend., 377; 1 Gray, 560.] 1873, Armsby v. People, 2 Supreme Ct. (T. & C.), 157.
- 50. Two offenses were charged in an indictment for seduction under promise of marriage, one laid July 2, the other August 10. Held, not error to refuse to compel the prosecution to elect upon which count to proceed. [3 Hill, 159.] 1873, Cook v. People, 2 Supreme Ot. (T. & C.), 404.
- 51. If it does not appear that the accused, if innocent, has it in his power to produce evidence controverting or explaining the testimony against him, except by his own omission to testify in his own behalf, the court is bound to charge, if requested, that the failure of the prisoner to produce any evidence is not to be considered by the jury. [24 Wend., 520.] Ct. of App., 1873, Ormsby v. People, 53 N. Y., 472.
- 52. The act of Laws of 1872, ch. 745, providing that a juror's opinion or impression in reference to the circumstances of the case or the guilt or innocence of the prisoner, &c., is not a sufficient ground of challenge for principal cause if he can render an impartial verdict, and if the court are satisfied that he does not entertain such a present opinion as would influence his verdict,—is not unconstitutional. The legislature has power to regulate the mode of procuring and impanneling a jury, provided care is taken to preserve the right of trial by an impartial jury. Ct. of App., 1873, Stokes v. People, 53 N. Y., 164.
- Proper terms of charge as to class of homicide. Ih.
 AMENDMENT; APPEAL, 22, 25, 26, 30; DEPOSITIONS; EXCEPTIONS;

TRUSTS AND TRUSTEES.

1. The court can not remove executors who are grantees of a beneficial and irrevocable power in trust, merely on the ground of their non-residence, or poverty, or inability to agree in settling their accounts; nor can the court require them to give security under penalty of forfeiting the estate. But it may compel them to execute the power in a proper case, and when so doing, may require the money to be paid into court either absolutely, or in case of their

UNDUE INPLUENCE,

failure to give security for its distribution. Supreme Ct., 1873, Van Boskerk v. Herrick, 65 Barb., 250.

- A sole resident acting trustee, in the long-continued absence abroad
 of his co-trustee, has the right to receive the money due on a mortgage, and to execute a satisfaction piece. N. Y. Superior Ct., Sp. ".,
 1873, People ex rel. Adams v. Sigel, 46 How. Pr., 151.
- Compensation of trustees, if provided for by the instrument, witnout defining the amount, is to be determined by the court in view of the services, and is not limited by the statute relating to executors. Ct. of App., 1873, Matter of Schell, 53 N. Y., 263.
- 4. Under our statute, upon the death of the surviving trustee of an express trust, such trust estate does not descend to his heirs nor pass to his personal representatives; but, if unexecuted, it vests in the supreme court. Carrere v. Spofford, Ante, 47.

Costs, 13, 19, 20; Court of Appeals, 5; Creditor's Suit, 1; Injunction, 18; Limitations, 18; Parties, 49-51.

TURNPIKES.

Remedy for want of repair. Suydam v. Smith, 52 N. Y., 383.

UNDERTAKING.

- 1. A defendant in an action to recover personal property is not estopped, by execution and delivery of the undertaking, from showing the true amount and value of the goods taken by the sheriff and redelivered to him, especially if neither plaintiff's affidavit nor the recitals in the undertaking are sufficiently definite to show the actual value or to properly identify the quantity. N. Y. Superior Ct., 1873, Talcott v. Belding, 46 How. Pr., 419.
- 2. In cases of this character the execution must particularly describe the property. "Two hundred dozen shirts and drawers, or thereabouts;" "forty dozen jackets, more or less," is not such description as the law requires. [Code, § 289, subd. 4; 13 Wend., 497.] Ib.
- 3. A plaintiff, in a suit for claim and delivery of personal property, who has failed to prosecute his action, for the sole reason that the justice before whom the action was to be tried was absent, is not liable on the undertaking given in the action for a failure to prosecute the same. [29 Barb., 472; 23 N. Y., 148.] 1873, Pierce v. Hardee, 1 Supreme Ct. (T. & C.), 557.
- 4. It seems, that by giving an undertaking and taking the property plaintiff obtains the mere right of possession, and as soon as the action falls defendant is entitled to the possession. [6 Hill, 560; 5 Denio, 21.] Ib.
- 5. Undertaking not a deed within the rules as to estoppel. Talcott 9. Belding, 46 How. Pr., 419.

APPEAL, 46; ATTACHMENT, 6-9; DISTRICT COURT, 1.

VENDOR AND PURCHASER.

UNDUE INFLUENCE.

By threat to send husband and son-in-law of women to States prison. Ingersoll v. Roe, 65 Barb, 346.

USURY.

- By 1 Laws of 1870, ch. 163 (7 Edm. Stat., 663), the usury law of this State is in effect repealed as to State banks organized under the banking law of 1838. Farmers' Bank of Fayetteville v. Hale, Ante, 276.
- 2. The usury law (1 R. S. 772, § 5) declared that all securities, &c., whereon there should be reserved a greater rate of interest than that above described [7 per cent.], should be void. The act of 1870, as to banking associations, provided that they might take seven per cent. in advance, and declared that their knowingly receiving a greater rate should be held and adjudged a forfeiture of the entire rate of interest; and repealed all inconsistent provisions. Held, that the forfeiture of the whole debt was inconsistent with forfeiture of interest merely, and was repealed thereby in respect to such banks as lenders. 1b.
- Such a bank, by receiving more than seven per cent. interest, only
 forfeits the entire interest, and may recover the principal. Ib.
- 4. The right to recover back money paid for a loan in excess of legal interest is not limited to the borrower. The injury done by the usurer is an injury to the estate of the borrower; and the right to recover back the amount of interest in excess of the legal rate passes to the assignee in bankruptcy. Wheelock v. Lee, Ante, 24.
- 5. Section 3 of the title of the Revised Statutes in relation to "the interest of money" is remedial, not penal. Ib.

CONFLICT OF LAWS, 3; DEMAND, 2; INJUNCTION, 9.

VARIANCE.

In an action for breach of promise of marriage the promise was laid March 15, 1869, and various times prior thereto in the years 1868 and 1869, and evidence of a promise in 1866 was admitted, under objection. Held, it not appearing that defendant was misled to his prejudice, it was not material. [Code, § 169.] 1873, Fowler v. Martin, 1 Supreme Ct. (T. & C.), 377.

VENDOR AND PURCHASER.

Claim for deficiency in quantity of land, and remedy therefor. Murdock v. Gilchrist, 52 N. F., 242.

WILLS.

WAIVER.

The assent of a party to a statute affecting his property, is a waiver of his right to question the constitutionality of the act. Such assent need not be in writing, but may be evinced by acting under it, and seeking and accepting benefits thereby conferred upon him. Ct. of App., 1873, Houston v. Wheeler, 52 N. Y., 641.

WASTE

- Although the action of waste, eo nomine, is abolished by the Code [Code, § 450], an action in the nature of waste may be maintained [Code, § 451] to which the provisions of the statute [2 R. S., 338], allowing treble damages, will apply. 1873, Robinson v. Kinne, 1 Supreme Ct. (T. & C.), 60.
- The damages are limited to those done to the freehold or inheritance. [51 Barb., 225; 26 Id., 409; 29 N. Y., 9.] Ib.
- That defendant had good reason to believe the lands wasted by him were his own, is not a defense to an action for treble damages. Ib. COMPLAINT, 19; COSTS, 4; FORMER ADJUDICATION, 5.

WILLS.

- 1. If the attestation clause is full and the signature is genuine, and the circumstances corroborative of due execution, and there is no evidence disproving a compliance in any particular, it may be presumed that the statute was fully complied with, although the witnesses are unable to recollect what took place. A mere failure of memory on the part of the witnesses after the lapse of a number of years does not preclude probate. Ct. of App., 1873, Matter of Kellum, 52 N. Y., 517.
- The rule that the capacity of the testator is a question of fact to be determined by evidence, and may be reviewed by the supreme court [34 N. N., 155], —reiterated. 1873, Harper v. Harper, 1 Supreme Ct. (T. & C.), 351.
- Of the testimony of experts on mental soundness; and that more weight may be given to circumstances indicating business capacity, if the will itself is reasonable. 1b.
- 4. A legatee may testify as a subscribing witness to a will. The objection to his being such is covered by the statute. [2 R. S., 65.] 1b.
- And so of an executor, especially if he have disclaimed any interest [13 N. Y., 93]. Ib.
- 6. When one of the subscribing witnesses to a will swears that all the statutory requirements have been complied with, the will may be admitted to probate, even if the other subscribing witness den. c. -xv. - 38

WILLS.

- nies that such was the case. [25 N. Y., 422; Id., 425.] 1873, Kinne v. Kinne (No. 1), 2 Supreme Ct. (T. & C.), 391.
- 7. It is not necessary that a will should be signed by the testator in the presence of the subscribing witnesses, provided the testator acknowledged his subscription before them. [22 N. Y., 372.] 1b.
- 8. The acknowledgment of the signature, and the publication by acknowledgment of the will may constitute one and the same act. [36 N. Y., 416; Id., 486.] Ib.
- 9. The surrogate, who has before him the witnesses to the execution of a will, is best qualified to determine where the truth lies, and his decision will be disturbed with great reluctance. Ib.
- 10. Proof that, at the time of the execution of a will, it was read over to the testator, in the presence of the subscribing witnesses; that the testator then signed, and, through a third person, requested the witnesses to sign their names as witnesses of his will, is sufficient to entitle the same to probate. 1873, Belding v. Leichardt, 2 Supreme Ct. (T. & C.), 52.
- 11. Any form of communication by which the testator makes known that the instrument is his will, is a sufficient publication. [23 N. Y., 15; 11 Id., 226.] 1b.
- 12. Where neither of the subscribing witnesses to a will and codicil testified to the testator's mental capacity, and one of them thought him not of sound mind at the execution of either, and it also appeared that in the succeeding autumn testator failed to know his children, inquired how many he had, and could only name some of them,—Held, that the surrogate's decision, refusing probate of the instrument should be affirmed. Supreme Ct., 1872, Dumond v. Kiff, 7 Lans. 465.
- 13. Under 2 R. S., 63, § 40, the subscribing witnesses of a will, as well as the testator, must put their signatures at the end of the will. Where the signatures of the witnesses, apparently by mistake in turning over the paper, were put on a blank page in the middle of the will,—Held, that the will was not duly executed. Heady's Will, Ante, 211.
- 14. It seems, that a will in which a whole page is left blank intervening in the midst of its disposing parts is not duly executed, at least, unless a line is drawn across the page so as to preclude fraudulent additions. Ib.
- 15. It seems, that any interest, however slight, or the bare possibility of an interest, is sufficient to entitle one to oppose probate; and that the executors under a will may oppose the probate of a later will, although the parties beneficially interested under the earlier, have released their interest. Matter of Greeley's Will, Ante, 393; compare Conboy v. Jenkins, 3 Supreme Ct. (T. & C.), 622.

- 16. Formalities of publication. Gilbert v. Knox, 52 N. Y., 125.
- 17. By Laws of 1864, ch. 311, as amended, Laws of 1872, ch. 680, an exemplified copy of a will made in another State or Territory of the United States, and the proofs thereof when recorded, equivalent to proof of the will in this State. 1874, Bromley v. Miller, 2 Supreme Ct. (T. & C.), 575.
- 18. A resident of New Jersey made her will, giving her executors power to convey her real estate. The will was proved in New Jersey, and an exemplified copy with the proofs, was filed in the office of the surrogate of Kings county. *Held*, a conveyance by executors conveyed a good title. *Ib*.
- 19. The validity of a bequest by testator of one State, to a town in another State, so far as dependent on the capacity of the town to take, is to be determined by the laws of the latter State. [43 N. Y., 424.] 1873, Kennedy v. Town of Palmer, 1 Supreme Ct. (T. & C.), 581.
- 20. The rule in Moultrie v. Hunt, 23 N. Y., 394, that as to personalty the execution of a will must conform to the law of the place of domicile at the time of death, whatever may have been the domicile at the time of making the will,—reiterated. Dupuy v. Wurtz, 53 N. Y., 556; affirming 64 Barb., 156.

APPEAL, 51; Costs, 20, 38; EVIDENCE, 56; PARTIES, 24, 25; WITNESS, 17.

- 1. Plaintiff, the vendor of a medicine which he advertised as compounded of powerful ingredients and having great virtues, brought an action for libel against defendants, who had denounced him as a quack and his medicine as a humbug; and defendants, in their answer, justified by alleging the worthless and deceptive character of his medicines. Held, that plaintiff, on examination at the instance of defendants before the trial, under sections 391-394 of the Code, was bound to answer specifically a question as to what ingredients his medicine was composed of. Richards v. Judd, Ante, 184.
- 2. The decision in Central National Bank v. Arthur (2 Sweeny, 194), that the court (and therefore a referee) has power to compel, by a subpœna duces tecum, the production, by a party, of his books or papers,—reiterated. And they should be produced, notwithstanding an objection to their competency, for they may contain admissions, and the objection to competency should be reserved until they are produced. 1871 Holtz v. Schmidt, 34 N. Y. Superior Ct. (2 Jones & S.), 28.

- 3. When part of the case or defense consists of the state of mind of the party, it is proper to ask him on the witness stand his declaration of his state of mind at a subsequent time, in reference to subjects alleged by him to induce that state of mind which is essential to his cause of action or defense. 1872, Livingston v. Keech, 34 N. Y. Superior Ct. (2 Jones & S.), 547.
- 4. Where the act is in itself illegal, the intent of the offender is immaterial, but where the character of the act depends on intent, proof of intent by the testimony of the person is admissible. [50 N. Y., 487.] 1873, Rutherford v. Aikin, 2 Supreme Ct. (T. & C.), 281; 1873, Cook v. People, 2 Id., 404.
- 5. A question addressed to a party, whether certain supplies were furnished on the credit of a certain security,—Held, to call for a fact, although involving the operation of the mind, and therefore to be admissible within the rule in 14 N. Y., 567. 1871, Lewis v. Rogers, 34 N. Y. Superior Ct. (2 Jones & S.), 64.
- 6. The rule that where a witness does not recollect all the items of an account, he may read from a memorandum, and then testify from memory thus refreshed,—reiterated. 1873, Boyne v. Newcomb, 1 Supreme Ct. (T. & C.), 251.
- It seems, that since Laws of 1867, ch. 887, husband and wife are (in a suit for limited divorce) as competent to give evidence in their own behalf as any other witnesses. Per Robinson, J., Carey v. Carey, 4 Daly, 270.
- The wife of the prisoner is not a competent witness in a criminal action or proceeding against him. Wilke v. People, 53 N. Y., 525.
- Rules as to what voluntary confessions are admissible. 5 Engl. R. (Moak's ed.), 167, n.*
- 10. The rule that confidential communications between attorney and client are privileged, applies, although the communications do not relate to litigation; and it extends equally to both parties. Carnes v. Platt, Ante, 337.
- 11. Instructions given an attorney by his client, concerning the settlement of a dispute, not in the presence or hearing of the opposite party, are not admissible in behalf of the party giving such instructions. 1873, Childs v. Delaney, 1 Supreme Ct. (T. & C.), 506.
- Any person of ordinary understanding, competent to testify whether one was sick or well. Higbie v. Guardian Mut. Life Ins. Co., 53 N. Y., 603.
- 13. Hypothetical questions upon facts assumed to have been estab-

^{*} The statement in 13 Abb. Fr., 209, here questioned, viz., that People c. MacMahon was overruled, is in fact the statement of the court, p. 251.

lished, are admissible in the examination of experts, as matters of opinion. [49 N. Y., 42; 15 Barb., 550; 9 Alb. L. J., 125.] 1874, Jackson v. N. Y. Central R. R. Co., 2 Supreme Ct. (T. & C.), 653.

- 14. Testimony of an expert as to the considerations that give value to services are proper. [9 Alb. L. J., 125.] Ib.
- 15. Upon a question of value the opinion of a witness who has seen the merchandise in question, and is acquainted with the value of similar things, is not incompetent [9 N. Y., 183],—reiterated. 1874, Bush v. Westchester Fire Ins. Co., 2 Supreme Ct. (T. & C.). 629.
- 16. A witness testifying as an expert in regard to the rental of houses, swore that he had had charge of the letting of sixty or seventy houses. Held, error to refuse to allow him to be asked on cross-examination how many houses he had let during the time he had been in that business. N. Y. Com. Pl., 1871, Drucker v. Simon, 4 Daly, 53.
- 17. In an action to establish a will, the opinions of non-professional witnesses as to the mental condition of the testator are incompetent. [42 N. Y., 270.] 1873, Sisson v. Conger, 1 Supreme Ct. (T. & C.), 564.
- 18. So are the declarations of a person not a party to the suit, nor connected with the parties. Ib.
- 19. A witness who had testified that he had been about livery stables a good deal, and doctored horses to a considerable extent, and that he knew the horse in question. Held, qualified to testify as an expert as to the disease under which the horse was suffering. 1873, Burden v. Pratt, 1 Supreme Ct. (T. & C.), 554.
- Admissibility of testimony of experts as to capacity of engines.
 1873, Water Commissioners v. Burr, 35 N. Y. Superior Ct. (3 Jones & S.), 523.
- 21. To a question as to what was the value of, or amount witness paid for, certain articles, he answered, stating the value. *Held*, that as he was not shown to be qualified to express an opinion to the value, it was error to receive the evidence. 1873, Chambovet v. Cagney, 35 N. Y. Superior Ct. (3 Jones & S.), 474.
- 22. In an action against the sheriff, to recover the value of goods taken by him from plaintiff, under process against a third person. where plaintiff claims under an assignment made by the transferee of the debtors in the process, the question whether such transferee was the owner of the goods at the time of the alleged assignment to plaintiff, calls for a fact, and not a conclusion of law; or if it be a conclusion of a law, this objection should be brought out on cross examination. Caspar v. O'Brien, Ante, 402.
- 23. Such a question is not objectionable as embracing the whole merits of the case. Ib.

- 24. The settled rule that where a witness is examined even as to formal matters, he is thereby made the witness of the party calling him, for all purposes, and may be cross-examined by the adverse party on the whole case, applies to a case where a party offers himself as a witness in his own behalf. 1872, Livingston v. Keech, 34 N. Y. Superior Ct. (2 Jones & S.), 547.
- 25. Where a party has testified as a witness in his own behalf, he may be asked, on cross-examination, whether he had not said before the trial, that he could not and would not swear to facts to which he had just testified. This is a proper mode of approaching to his knowledge of material facts which may be the foundation of his belief. [33 N. Y. Superior Ct., 293.] Ib.
- 26. Rules applicable to leading questions, when addressed on cross-examination to a party who had testified in his own behalf. 1b.
- 27. In an action for goods sold, if defendant, testifying as a witness, simply denies that he promised to pay, as alleged by plaintiff, he can not be asked on cross-examination as to what goods he received. Otherwise, if on his direct examination, he testified to the amount received. 1871, Rocke v. Meiner, 34 N. Y. Superior Ct. (2 Jones & S.), 158.
- 28. In an action for goods sold, a question addressed to defendant whether he received any other goods belonging to a specified person is not objectionable, merely on the ground that the qualification as to ownership calls for a conclusion of law. Ib.
- 29. Not error to refuse to allow counsel to read over to witness his testimony before answering a further question. 1873, Patton v. Dodge, 2 Supreme Ct. (T. & C.), 229.
- 30. When a prisoner under indictment testifies in his own behalf, he is subject to the same rules of examination, and to be contradicted, as another witness. Supreme Ct., 1873, Fralich v. People, 65 Barb., 48.
- Evidence to show hostile feeling on part of witness, not admissible on that ground merely, unless object of evidence is clearly disclosed. Cook v. Spaulding, 52 N. Y., 661.
- Evidence of interference of witness to prevent settlement not admissible, except through cross-examination. Leach v. Leach, 2 Supreme Ct. (T. & C.), 657.
- 33. Permission given to a party to cross-examine an unwilling witness, merely permits leading questions to be asked. It confers no right to impeach. 1873, Sisson v. Conger, 1 Supreme Ct. (T. & C.), 564.
- 34. When a party on cross-examination brings out evidence material to the issue, he is not bound thereby, but may contradict it by other witnesses. Supreme Ct., 1873, Newberry v. Furnival, 46 How. Pr., 139.
- 35. To impeach a witness it is competent to show an extra judicial

statement of opinion, made by him, as well as to show one of fact, adverse to his testimony. Supreme Ct., 1873, Schell v. Plumb, 16 Abb. Pr. N. S.

- 36. Showing that a witness was mistaken, not deemed an impeachment of the witness, within the rule that a party can not impeach his own witness. Hildreth v. Shepard, 65 Barb., 265.
- 37. A party, upon being taken by surprise by unexpected testimony given by his own witness, may be permitted to interrogate him in respect to his previous declarations inconsistent with his testimony, for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out explanation of apparent inconsistency. And the fact that this may involve the witness in contradictions calculated to impair his credibility is not a sufficient reason for excluding the inquiry. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken, and to induce him to correct his evidence, should not be excluded simply because they may impair his credibility; but questions as to such statements must, it seems, be confined to the witness himself. But where the only effect which could be claimed from a favorable answer would be to discredit the witness on the ground that he was testifying to matters of which he had previously disclaimed any knowledge, and that his latter evidence was fabricated, the question is incompetent. The party should not go further than ask whether at the time inquired of he recollected the matters to which he testified on his last examination. Ct. of App., 1873, Bullard v. Pearsall, 53 N. Y., 230.
- 38. A witness having been asked, on cross-examination, for the purpose of impairing the credibility of her testimony, whether she had stolen from an employer,—Held, that it was error to allow the impeaching party to prove by the testimony of the employer that the witness's answers to these questions were untrue. [5 Wend., 301; 4 Den., 502.] Ct. of App., 1873, Stokes v. People, 53 N. Y., 164.
- 39. Fraud and conspiracy on the part of the witness do not make an exception to the rule that a party can not impeach his own witness. The utmost he can do is to show him to be mistaken, or that the facts are not as he states them. 1873, Sisson v. Conger, 1 Supreme Ct. (T. & C.), 564.
- 40. A witness may be impeached by showing that at the time of the transaction he was in such a state of mind as to be incapable of exercising a correct discrimination, or that he was intoxicated. [1 Cowen & Hill's Notes, 763, 767.] Ib.
- 41. To entitle a party to have evidence on direct examination, stricken out because the witness does not appear, to be cross-examined, the loss of cross-examination must be chargeable to the misconduct or

- neglect of the party calling him, otherwise the opposite party is not entitled to relief. 1878, Burden v. Pratt, 1 Supreme Ct. (T. & C.), 554.
- 42. Accordingly when plaintiff's witness was examined and cross-examined, and plaintiff's counsel was notified to produce him next day for further examination, and the trial went on, and the witness failed to appear at the time appointed,—Held, that plaintiff was not at fault in not producing him. Ib.
- 43. On the cross-examination of a witness called as an expert to prove the value of professional services, it is not a matter of right to in quire what is his professional income. Ct. of App., 1873, Harland v. Lilienthal, 53 N. Y., 438.
- 44. The rule that it is the duty of the court and jury to give credit to unimpeached and uncontradicted testimony, does not impair the power of determining if a witness is credible, but implies the presumption that witness testified correctly. If there is, in the testimony itself, anything which tends to impeach the credibility of the witness giving it, it is not error to disregard the testimony. [25 N. Y., 363; 49 Barb., 587; 6 Hill, 447.] 1873, Stafford v. Leamy, 34 N. Y. Superior Ct. (2 Jones & S.), 269.
- 45. The question "Have witnesses been called to swear they would not believe your oath," put to a witness on cross-examination, is improper, and the evidence inadmissible. [49 Barb., 342; 2 Sweeney, 582.] 1873, Burvee v. People, 1 Supreme Ct. (T. & C.), 289.
- 46. Evidence to explain collateral matters testified to by impeaching witnesses on cross-examination is inadmissible. 1873, Chace v. Higgins, 1 Supreme Ct. (T. & C.), 229.
- 47. Various rules as to cross-examination,—applied. Railway Passengers' Assurance Co. v. Warner, 1 Supreme Ct. (T. & C.), adden., 21.



